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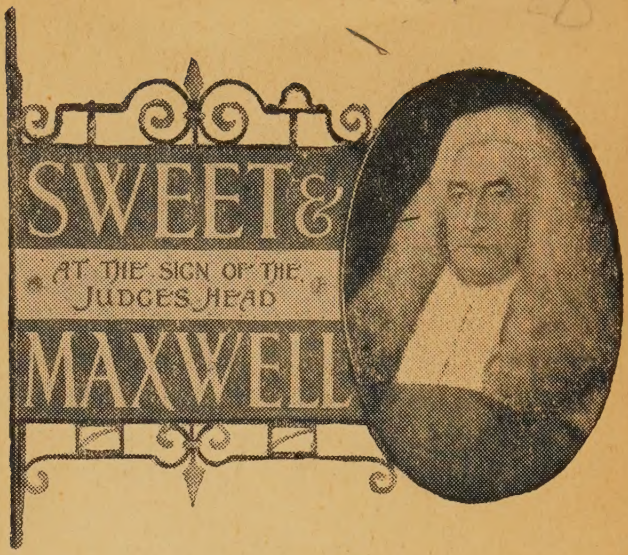

MIDDLE TEMPLE LIBRARY
WITHDRAWN STOCK

A TREATISE

ON

WILLS

BY

THOMAS JARMAN, ESQ.

The Seventh Edition

BY

CHARLES PERCY SANGER,

OF LINCOLN'S INN, BARRISTER-AT-LAW,

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THE LAW

WITH RESPECT TO

WILLS.

VOLUME III.

CHAPTER XL.

GIFTS TO THE HEIR AS PURCHASER (WITHOUT ANY ESTATE IN THE ANCESTOR).

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I.—General Principles of Construction of Gifts to the Heir.— Although after 1925 the real property of an intestate does not descend to his heir, but is administered in accordance with the provisions of the Administration of Estates Act, 1925, so that in one sense the heir at law is abolished (except as regards entailed interests); yet by virtue of section 132 of the Law of Property Act, 1925, a gift by a will coming into operation after 1925 of either real or personal property in favour of the heir, either general or special, of a deceased person will confer an equitable interest in the property corresponding to that which a gift of land

Section 132 of the Law of Property Act, 1925.

to such heir would have created in a will coming into operation before 1925. It will thus be seen that the matters treated of in this chapter will continue to be of importance, but that the law may be modified in respect of gifts of personalty to the heir (*a*).

Gifts to "heir," how construed.

Mr. Jarman points out that (*b*), "Gifts to the heir, whether of the testator himself, or of another, are so frequently found in wills, and where these instruments are the production of persons unskilled in technical language, the term *heir* is so often used in a vague and inaccurate sense, that to ascertain and fix its signification in regard to real and personal estate respectively, whether alone or in conjunction with other phrases which most usually accompany it, is a point of no inconsiderable importance. Like all other legal terms, the word *heir*, when unexplained and uncontrolled by the context (*c*), must be interpreted according to its strict and technical import (*d*); in which sense it obviously designates the person or persons appointed by law to succeed to the real estate in question in case of intestacy. It is clear, therefore, that where a testator devises real estate simply to his heir, or to his heir at law, or his right heirs, the devise will apply to the person or persons answering this description at his death, and who, under the recent enactment regulating the law of inheritance (*e*), would take the property in the character of devisee, and not, as formerly, by descent. And the circumstance that the expression is *heir* (in the singular) and that the heirship resides in, and is divided among, several individuals as co-heirs or co-heiresses, would create no difficulty in the application of this rule of construction; the word 'heir' being in such cases used in a collective sense, as comprehending any number of persons who may happen to answer the description (*f*); and which persons, if more than one, would, if there were no words to sever the tenancy, be entitled as joint tenants" (*g*).

Devise to "heirs" passes fee simple.

A devise to "the heirs" of the testator or any other person, (though contained in a will made before 1838,) vests in the heir an estate in fee simple, without words of limitation or any

(*a*) The heir will be traced under the old law. For the rules see Sanger on Wills and Intestacies, Chap. XVII.

(*b*) First ed., Vol. II, p. 1.

(*c*) It must also be remembered that the construction of the word "heir" may be affected by the nature of the property disposed of by the gift, *post*, p. 1540.

(*d*) As to the validity of a gift of real or personal property to A for his own life and the life of his heir, see *Re Amos*, [1891] 3 Ch. 159, *ante*, p. 1171.

(*e*) 3 & 4 Will. 4, c. 106, s. 3.

(*f*) *Mounsey* v. *Blamire*, 4 Russ. 384.

(*g*) Litt. s. 254. *Re Baker*, 79 L. T. 343; *Owen* v. *Gibbons*, [1902] 1 Ch. 636. The latter cases also decide that the word "heir" in section 3 of the Inheritance Act includes "heirs"; *ante*, p. 84. Compare *Berens* v. *Fellowes*, 56 L. T. 391.

equivalent expression, "for being plurally limited it includeth a fee simple, and yet it vesteth but in one by purchase" (*h*).

Re Waugh.

In *Re Waugh* (*i*), the testator devised a cottage to a granddaughter "and her heirs" and another cottage to a grandson "and his heirs," with a gift over, if either of them died without an heir, "to the survivor's heir or heirs"; it was argued that as each grandchild took an estate tail under the original gift (*k*), the same construction ought to be placed on the gift over, but the argument failed, and it was held that "the survivor's heir or heirs" meant his or her heirs general.

"Next-of-kin and nearest heir."

In *Re Maher* (*l*), a testator directed that in a certain event his property, which consisted of both real and personal estate, should go to "my next-of-kin and nearest heir of my name and family." It was contended that the testator meant by this description to indicate one person, but it was held that his personal estate went to his next-of-kin, and that his real estate went to his heir-at-law.

A devise to the right heirs of a husband and wife is a devise to such person as answers the description of heir to both (*m*).

Heirs of the body as purchasers.

With reference to the general principle of construction above laid down (*n*), Mr. Jarman continues (*o*): "Upon the same principle it is well settled, that a devise to *the heirs of the body* of the testator or of another confers an estate tail; which estate, it is to be observed, will (unless stopped in its course by the disentailing act of the tenant in tail), devolve to all persons who successively answer the description of heir of the body.

Mandeville's Case.

"The leading authority for this doctrine is *Mandeville's Case* (*p*), the circumstances of which aptly illustrate the peculiar mode of devolution in such cases. John de Mandeville died leaving issue by his wife, Roberge, two children, Robert and Maude. A gave certain lands to Roberge, and to the heirs of John de Mandeville, her late husband, on her body begotten; and it was adjudged that Roberge had an estate but for life,

(*h*) Co. Litt. 10 a. See *Durdant* v. *Burchet*, Skinn. 205; *Marshall* v. *Peascod*, 2 J. & H. 73 (deed); *Moore* v. *Simkin*, 31 Ch. D. 95 (deed).

(*i*) [1903] 1 Ch. 744.

(*k*) Under the rule stated *post*, p. 1806.

(*l*) [1909] 1 Ir. 70.

(*m*) *Roe* d. *Nightingale* v. *Quartley*, 1 T. R. 630.

(*n*) *Ante*, p. 1526.

(*o*) First ed., Vol. II, p. 2.

(*p*) Co. Litt. 26 b. See also *Southcot* v. *Stowell*, 1 Mod. 226, 237; 2 Mod. 207; Freem., pp. 216, 225; *Wills* v. *Palmer*, 5 Burr. 2615; 2 W. Bl. 687. The entail must be traced as if limited originally to the testator or other person so as to be descendible from him to the claimant. It may, of course, be general or special, but must not be eccentric or invented to suit the occasion: *Allgood* v. *Blake*, L. R. 7 Ex., at p. 363; 8 Ex. 160; *per* Bosanquet, J., 9 Cl. & F., at p. 625. *Moore* v. *Simkin*, 31 Ch. D. 95; *post*, p. 1541.

and the fee tail vested in Robert (heir of the body of his father, being a good name of purchase,) and that then, when he died without issue, Maude, the daughter, was tenant in tail of the body of her father, *per formam doni.* 'In which case it is to be observed,' says Lord Coke, 'that albeit Robert being heir, took an estate tail by purchase, and the daughter was no heir of his (John's) body at the time of the gift, yet she recovered the land *per formam doni*, by the name of heir of the body of her father, which, notwithstanding her brother was, and he was capable at the time of the gift; and, therefore, when the gift was made, she took nothing but in expectancy, when she become heir *per formam doni.*' "

The authority of *Mandeville's Case* was fully recognised by the House of Lords in *Vernon* v. *Wright* (*q*).

Mr. Jarman seems to have assumed that section 28 of the Wills Act has not altered the rule above stated, which rests on cases decided under the old law. It might no doubt be held that such a devise shows a "contrary intention" within the meaning of the section, but the point does not seem to have arisen.

Two questions seem never to have been decided. Whether a devise in a will dated before 1838 to "heir" is as effective to confer an estate in fee simple as one to "heirs"; and whether a devise to the "heir of the body" in the singular would confer an estate tail (*r*). They are discussed in the 6th edition of this work at pp. 1554 *et seq.*; but as it seems improbable that either point will arise now this discussion is omitted in the present edition.

Illegitimacy.

In *Re Cullum* (*s*) the testatrix was illegitimate; after devises of life estates to persons described as the sons of her "brothers," with remainders in tail, there was an ultimate limitation to her own right heirs. It was held that the ultimate remainder failed and that the property went to the Crown.

"Heirs and assigns."

In *Quested* v. *Michell* (*t*), where there was a gift of real and personal estate upon trust for A for life and after her death to her heirs, executors, administrators, and assigns, Kindersley, V.-C., (following a suggestion thrown out by Willes, C.J., in *Tapner* v. *Merlott* (*u*)) held that this gave her a power of appointment

(*q*) 7 H. L. C. 35; *S.C. sub nom. Wright* v. *Vernon*, 2 Drew. 439; *Hamilton* v. *Loughhead*, [1918] 1 Ir. 227.

(*r*) See *Dubber* v. *Trollope*, Amb. 453. As to a deed, see *Re Davidson's Settlement*, [1913] 2 Ch. 498.

(*s*) [1924] 1 Ch. 540.

(*t*) 24 L. J. Ch. 722, *ante*, p. 767.

(*u*) Willes, 177.

over the realty with a limitation to her heirs in default of appointment (*t*). But this decision cannot be regarded as laying down any general principle, and in *Milman* v. *Lane* (*x*), a devise to A for ninety-nine years if he should so long live, with remainder to his four sons for a similar term, with remainder to the heirs and assigns of the survivor of the four sons was held to give the fee to the heir-at-law of the last surviving son, the word "assigns" being rejected as surplusage.

"Heir" with superadded qualification.

II.—Gifts to the Heir with Superadded Qualification.—Mr. Jarman continues (*y*): "Where a testator has thrown into the description of heir an additional ingredient or qualification, the devisee must answer the description in both particulars. Thus a devise to the right heirs *male* of the testator, or to the right heirs *of his name*, is, according to the early cases, to be read as a devise to the heir, provided he be a male, or provided he be of the testator's name (as the case may be); and, consequently, on the principle just stated, if the character of heir should happen to devolve to a person not answering to the prescribed sex or name, the devise would fail (*z*).

"Right heirs male," how construed.

"Thus, in *Ashenhurst's Case* (*a*), where the devise was to the *right heirs male* of the testator for ever; it was held both in B. R. and in the Exchequer Chamber, that, as the testator died leaving no other issue than three daughters (who were, of course, his heirs general), the devise failed, and did not apply to his next collateral heir male.

"Right heirs of my name and posterity."

"So, in *Counden* v. *Clerke* (*b*), where a testator, having issue a son and daughter, and two grand-daughters the issue of his daughter, devised an annuity out of certain lands to his grandchildren, and a legacy to his brother; and then declared that the lands should descend unto his son, and, if he died without issue of his body, then to go unto his (the testator's) *right heirs of his name and posterity*, equally to be divided, part and part alike; and then to his granddaughters he devised another annuity out of the land. The question was, whether the devise to the right heirs of his name and posterity was a good devise to the

(*x*) [1901] 2 K. B. 745; *Brookman* v. *Smith*, L. R. 6 Ex. 291; 7 Ex. 271.

(*y*) First ed., Vol. II, p. 5.

(*z*) It should be remembered that in all these cases the whole scheme of the will must be considered. In *Micklethwait* v. *Micklethwait* (4 C. B. (N.S.) 790), there was a shifting clause to take effect in the event of A becoming entitled to a settled estate "in the character of the then heir male of the body" of X, his father; A became entitled to the estate as tenant in tail by purchase, but it was held that the shifting clause took effect.

(*a*) Cited Hob. 34.

(*b*) Moore, 860, pl. 1181; Hob. 29. See also *Starling* v. *Ettrick*, Pre. Ch. 54; *Lord Ossulston's Case*, 3 Salk. 336, 11 Mod. 189, Co. Litt. 25 a; *Dawes* v. *Ferrers*, 2 P. W. 1, 8 Vin. Ab. 317, pl. 13, Pre. Ch. 589.

testator's brother, who was of his name, but was not his heir. It was held, that the brother was not entitled, and that the devise was void " (*c*). And the principle of these decisions was adopted in *Wrightson* v. *Macaulay* (*d*), where it was held, that under a devise to the testator's " right heirs being of the name of H.," the person who was his nearest relation of that name, but not his heir, had no claim. *Thorpe* v. *Thorpe* (*e*) is to the same effect.

Doctrine excluded.

But the doctrine of " very heir," as it is sometimes called, does not apply where the word " heir " is used in a special sense : as where the gift is to the " heir male (or female) now living " (*f*). And in accordance with the modern rule as to the construction of gifts to heirs male of the body, the doctrine will be excluded where a gift to " male heirs " is taken to mean heirs male of the body; as in *Doe* d. *Angell* v. *Angell* (*g*), where the will showed that the testator intended to give the preference to a male descendant tracing a descent entirely through males, over the heir general not tracing a descent entirely through males.

" Nearest male heir."

In *Lightfoot* v. *Maybery* (*h*) Lord Atkinson says " the result of the authorities would appear to me to be this, that while Lord Coke's rule has not become obsolete, and is still to be applied as a rule of construction, it is not to be applied so rigorously as formerly. In that case " nearest male heir " was held to mean the testator's nearest male relative.

(*c*) " But is there not ground to contend, that a devise to the heirs male of the testator operates as a devise to the heirs male *of his body*, seeing that it has been long settled that a devise to A and his heirs male, or to A and his heirs female, confers an estate tail special (*Baker* v. *Wall*, 1 Ld. Raym. 185); and such is likewise the effect of a devise to A for life, and, after his death, to his right ' heirs ' male for ever (*Doe* d. *Lindsey* v. *Colyear*, 11 East, 548); the word ' heirs ' being in these several cases construed to mean heirs *of the body*. Indeed, the opinion of the Court seems to have been in favour of such a construction in *Lord Ossulston's Case*, 3 Salk. 336, *S.C.* Co. Litt. 25 a, where one Ford, having issue three sons and a daughter, and also a brother, devised to his three sons successively in tail male, with remainder to his own right heirs male for ever; and the three sons being dead without issue, the whole Court held that the brother could not take as male heir—first, *because a devise to heirs male operates as a limitation to heirs male of the body*, and the brother could not be heir male of the devisor's body; secondly, because the remainder to the heirs male were words of purchase, and by purchase the brother could not take as heir male, his niece being the heir at common law. As the case on the latter ground accords with the antecedent authorities above stated, it would not be safe or correct to treat it as an adjudication on the first point; though, if the Court had been called upon to decide the case, it is pretty evident what the decision would have been. The doctrine of these cases was recognised in the recent case of *Doe* d. *Winter* v. *Perratt*, 5 B. & Cr. 65, 3 M. & Sc. 605 [9 Cl. & Fin. 606], where, however, the question before the Court was (as we shall presently see) different." (Note by Mr. Jarman.) See also *Doe* d. *Angell* v. *Angell*, 9 Q. B. 328.

Whether devise to heirs male means heirs male of the body.

(*d*) 14 M. & Wel. 214.

(*e*) 1 H. & C. 326. See also *Re Maher*, [1909] 1 Ir. R. 70 (" nearest heir of my name and family ").

(*f*) *Chambers* v. *Taylor*, 2 My. & C., at p. 385.

(*g*) 9 Q. B. 328.

(*h*) [1914] A. C. 782.

Whether devise to heirs of the body male or female, applies to a person not heir general.

"It remains to be considered," Mr. Jarman says (*i*), "how far the doctrine of the preceding cases is applicable to limitations to heirs *of the body*. Sir Edward Coke (*k*) lays down the following distinction: 'That where lands are given to a man and his heirs females of his body, if he dieth leaving issue a son and a daughter, the daughter shall inherit; for the will of the donor, the statute working with it, shall be observed. But in the case of a purchase, it is otherwise; for if A have issue a son and a daughter, and a lease for life be made, the remainder to the heirs females of the body of A, and A dieth, the heir female can take nothing, because she is not heir; for she must be heir and heir female, which she is not, because her brother is heir.'

"The latter branch of this proposition has been the subject of much controversy. Lord Cowper, in the well-known case of *Brown* v. *Barkham* (*l*), [denied] it to be law, and so decided; and though the propriety of his determination was questioned by Lord Hardwicke, before whom the case was brought by a bill of review (*m*), and though Mr. Hargrave has defended the position of his author with his usual acuteness and learning (*n*), yet subsequent cases appear to have established, in opposition to Coke's doctrine, that a limitation, either in a will or deed, to the heirs special of the body by purchase, will take effect in favour of the designated heir of the body (if any) *though he or she be not the heir general of the body*. Thus, in the case of *Wills* v. *Palmer* (*o*), it was held, that, under a devise in remainder to the heirs male of the body of A (a person who had no estate of freehold under the will), the second son of A was entitled as heir *male* of the body, though he was not heir general of the body, which character belonged to a granddaughter, the child of a deceased elder son.

Heir male of body as purchaser held entitled, though not heir general.

"This case was followed by *Evans* d. *Weston* v. *Burtenshaw* (*p*), in which the same construction was applied to the limitations of a marriage settlement. In this state of the authorities, it seems unnecessary to encumber the present work with a statement of the numerous early cases on the subject (*q*),

(*i*) First ed., Vol. II, p. 7.
(*k*) Co. Litt. 24 b.
(*l*) Pre. Ch. 442, 461. 1 Stra. 35, 2 Vern. 729; and see *per* Hale, C.J., *Pybus* v. *Mitford*, 1 Freem. 369.
(*m*) Amb. 8.
(*n*) Co. Litt. 24 b, n. (3).
(*o*) 5 Burr. 2615.
(*p*) Co. Litt. 164 a, n. (2).
(*q*) "The reader who wishes to examine these cases will find the authorities on one side fully stated in Mr. Hargrave's note above referred to, and those on the other in Mr. Powell's Treatise on Devises, vol. i, p. 319, 3rd ed.; these authors having both displayed much industry in the search for cases to support their respective views. It should be observed

which (conflicting as they are) cannot exert much influence on a question which has been the subject of three distinct adjudications of a comparatively recent date, all concurring to support the more convenient and liberal construction. It is probable, indeed, that a Judge less abhorrent of technical and rigid rules of construction than Lord Mansfield, would have hesitated to decide as his Lordship did in *Wills* v. *Palmer*, and *Evans* v. *Burtenshaw*, in the teeth of the high authority of Lord Coke; but it is still more probable that the Courts at the present day, would refuse to set the question again afloat, by attempting to overrule those cases, even if they disapproved of the principle on which they were decided."

Limits of the "very heir" doctrine.

It is now clearly settled that so far as estates tail are concerned, Lord Coke's doctrine is no longer applicable (*r*), and even in other cases it will not be applied if it would defeat the clear intention of the testator, as in *Chambers* v. *Taylor* and *Doe* d. *Angell* v. *Angell* (*s*).

Heir male of the body claiming by descent, must claim through heirs male.

"And here it may be proper to notice," Mr. Jarman continues (*t*), "that, in order to entitle a person to *inherit* by the description of heir male or heir female of the body, it is essential not only that the claimant be of the prescribed sex, but that such person trace his or her descent entirely through the male or female line, as the case may be. Thus, it is laid down by Littleton (*u*), that 'if lands be given to a man and the heirs male of his body, and he hath issue a daughter, who has issue a son, and dieth, and after the donee die, in this case the son of the daughter shall not inherit by force of the entail; for whoever shall inherit by force of a gift made to the heirs male, ought to convey *his descent wholly by the heirs male*.'

Aliter as to heirs taking by purchase.

"It is otherwise, however, in the case of gifts to the heir male or female by *purchase*; for, if lands be devised to A for life, and, after his decease, to the heirs male of the body of B, and B have a daughter who dies in his lifetime, leaving a son, who survives B (all this happening in the lifetime of A, the tenant for life), such grandson is entitled, under the devise, as a person answering the description of heir male of the body of B, he being not only the

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that Mr. Hargrave's strictures were written before the cases of *Wills* v. *Palmer* and *Evans* v. *Burtenshaw*, and that in many of the cases cited by him the devise was to the heirs general; as to which it is not attempted to impugn the doctrine for which he contends." (Note by Mr. Jarman.)

(*r*) *Wrightson* v. *Macaulay*, 14 M. & W., at p. 231.

(*s*) *Ante*, p. 1530.

(*t*) First ed., Vol. II, p. 9.

(*u*) Sec. 24.

immediate heir of B (though the heirship is derived through his deceased mother (*x*)), but being also of the prescribed sex (*y*).

"It should be observed, however, that in the case of *Oddie* v. *Woodford* (*z*), which arose on the celebrated will of Mr. Thellusson, and also in *Bernal* v. *Bernal* (*a*), a devise to male descendants was held to be confined to males claiming through males, and not to comprise descendants of the male sex claiming through females; but in neither of these cases does the rule in question seem to have been impugned, the decision having, in each instance, been founded on the context. In *Oddie* v. *Woodford*, Lord Eldon dwelt much on the association of the word '*lineal*' with male descendant; the expression being 'eldest male lineal descendant' (*b*). The word 'lineal,' indeed, may seem, in strictness, not to materially add to the force of the word 'descendant'; but his lordship considered that, having regard to all parts of the will, and to the rule which imputes to a testator an additional meaning for each additional expression, the anxious repetition of the word 'lineal,' in every instance, indicated an intention to confine the devise to persons of male lineage. But though neither Lord Eldon nor Lord Cottenham questioned the rule of construction, which reads a devise simply to the male descendant of A as applying to the male issue of a female line; yet their respective decisions teach the necessity of caution in the application of the rule, and of a diligent examination of the context, before such a hypothesis is adopted."

Modern doctrine.

Mr. Jarman's distinction has not so far received any support, either from the Judges or from the text writers.

In *Thellusson* v. *Rendlesham*, where the gift was to the "eldest male lineal descendant," Lord St. Leonards said (*c*): that "as to the word 'male,' the meaning of that was thought for a long while to be very doubtful, but it has been held to mean

(*x*) Hob., p. 31; Co. Litt. 25 b.

(*y*) "This distinction, however, seems to have been lost sight of by Mr. Justice Taunton, in the recent case of *Doe* d. *Winter* v. *Perratt*, 3 M. & Sc. 586, who, on the authority of the above-cited passage in Littleton, seems to have considered, that even under a devise to the heir male of the body *by purchase*, the heir must derive his title entirely through males, and that the male issue of a deceased daughter could not under any circumstances support a claim. The case, however, did not raise the point; and others of the learned Judges in the same case expressly recognised the distinction stated in the text." (Note by Mr. Jarman.)

(*z*) 3 My. & Cr. 584.

(*a*) 3 My. & Cr. 559. "This is rather a decision on the question who shall *inherit*, than on that of who can claim as *purchaser* a legacy given to male children (construed descendants); in which view it agrees with the general rule, that the descent is to be traced wholly through males." (Note by Messrs. Wolstenholme and Vincent, in the third edition of this work, Vol. II, p. 62.)

(*b*) "Eldest" was afterwards held to mean prior in line, not senior by birth: *Thellusson* v. *Rendlesham*, 7 H. L. C. 429 (same will).

(*c*) 7 H. L. C., at p. 512. See also *Doe* d. *Angell* v. *Angell*, 9 Q. B. 328. *Loftus* v. *Stoney*, 17 Ir. Ch. 178.

males claiming through males." And in *Lywood* v. *Kimber* (*d*), where personalty was given to the "issue male" of a person, Romilly, M.R., said that the words must be construed in their strict technical sense, which means issue male claiming through males. The distinction is disapproved of by Mr. Davidson (*e*) and Mr. Vaughan Hawkins (*f*).

Devise to heir male may apply to several grandsons.

The following remarks by Mr. Jarman must be read subject to what has just been said with reference to the distinction taken by him between heirs by inheritance and heirs by purchase. He says (*g*): "Since, therefore, the son of a deceased female may take by purchase under the description of heir male, it follows that several individuals, as grandsons, may become entitled under a devise to heirs male, or even (as several co-heirs make but one heir) to heir male in the singular. As where a testator devises real estate to the heir male of his body, and dies without leaving any son or daughter surviving him, but leaving grandsons the issue of several deceased daughters, the sons of the several daughters respectively, or, if more than one, the eldest sons of the several daughters, are concurrently entitled, under such devise, as the heir or heirs male of the testator. Under such circumstances, however, considerable difficulty is occasioned, if the testator has prefixed to the word 'heir' any expression showing that he had in his view a single individual; as in the case suggested by Lord Coke (*h*), who says, 'If lands be devised to one for life, the remainder to the next heir male of B, in tail, and B hath issue two daughters, and each of them hath issue a son, and the father and the daughters die; some say the remainder is void for uncertainty; some say the eldest shall take, because he is the worthiest; and others say that both of them shall take, for that both make but one heir.'"

"Next heir male," how construed as between sons of several daughters.

Technical sense of "heir male" not always adopted.

Assuming that Mr. Jarman's conclusions on the question above discussed are erroneous, it is clear that the expression "heir male" or "heir female" will not be construed in its technical sense if thereby the obvious intention of the testator would be defeated. This appears from a majority of the opinions of the Judges in *Doe* d. *Winter* v. *Perratt* (*i*), where a devise in remainder was "to the first male heir of the branch of my uncle Richard Chilcott's family" (*k*); the facts being that, at

"First male heir" in similar case.

(*d*) 29 Bea. 38.
(*e*) Conv. iii 347 n.
(*f*) Wills, 3rd ed., p. 207.
(*g*) First ed., Vol. II, p. 11.
(*h*) Co. Litt. 25 b.
(*i*) 5 B. & Cr. 48; in D. P., 3 M. & Sc. 586, 10 Bing. 198, 9 Cl. & Fin. 606, 6 M. & Gr. 314. See *Lightfoot* v. *Maybery*, [1914] A. C. 782.
(*k*) "Words in which it would probably require the eye of a lawyer to discern the germ of interminable litigation." Davidson, Conv., Vol. iii, at p. 349.

Doe v. *Perratt.*

the date of the will, the uncle was dead, leaving five daughters, of whom the eldest died before the remainder fell into possession (which happened in July, 1820), leaving several daughters, one of whom (who was living) had a son born in 1795; the uncle's second daughter (who was also living) had a son born in 1763, and the fourth (who was dead) a son born in 1768. It was agreed, both in the Court of King's Bench and in the House of Lords, that the devisee must be a single individual; but as to the meaning of the word "first," the only point decided was that the second daughter's son, though first in priority of birth, was not the first male heir within the meaning of the will (*l*). That construction was upheld indeed by two of the Judges, but opposed by nine others; of whom two favoured the claim of the eldest daughter's grandson as being first in priority of line; five, with Lord Brougham, were of opinion (*diss.* Lord Cottenham and six Judges) that the son of the fourth daughter was entitled, because, by the decease of his mother, he had first acquired the character of male *heir*, in the strict sense of the word (*m*), while the remaining two held the will void for uncertainty (*n*).

Nemo est hæres viventis.

III.—The Word "Heir" when construed "Heir Apparent."—Mr. Jarman continues (*o*): "It is clear, that no person can sustain the character of heir, properly so called, in the lifetime of the ancestor, according to the familiar maxim, *nemo est hæres viventis.*

"Therefore, where (*p*) a man having two sons, devised lands

(*l*) This was the only question before D. P. on appeal in ejectment, on the demise of the second daughter's son. "In favour of the claim of the stock of the eldest daughter, some reliance appears to have been placed on *Harper's Case*, which is thus stated in Hale's MSS., Co. Litt. 10 b:—'Harper, having a son and four daughters, namely, A, B, C, and D, devises to the son in tail, remainder to B and C for life, remainder *proximo consanguinitatis et sanguinis* of the devisor; and in Easter, 17 James, by two justices against one, the remainder vests in all the daughters when the son dies without issue; but afterwards, Michaelmas, 20 James, *per totam curiam*, it vests in the eldest daughter only, and not in all the daughters—first, because *proximo*; secondly, because an express estate is limited to two of the daughters.' *Perriman* v. *Pearce*; Hale's MSS. See *S. C.* in Palmer 11, 303, 2 Roll. Rep. 256; nom. *Perim* v. *Pearce*, Bridg. 14, O. Bendloe, 102, 106. It was also observed, that though the course of descent among females is to all equally, yet that for some purposes the elder is preferred, as in the case of an advowson held in co-parcenary, in which the first right to present is conceded to the elder; and so under a partition made by a third person among parceners, in which the elder has the choice of several lots." (Note by Mr. Jarman.)

(*m*) As to this see next paragraph.

(*n*) "Heir of a family" was said to be an expression not known to the law; but, in *Horsfield* v. *Ashton*, 1 W. R. 259, Lord Cranworth was of opinion that a devise in remainder to the "heir of the testator's family" was not void for uncertainty. See also *Tetlow* v. *Ashton*, 20 L. J. Ch. 53, 15 Jur. 213.

(*o*) First ed., Vol. II, p. 12.

(*p*) *Challoner* v. *Bowyer*, 2 Leon. 70. See also *Archer's Case*, 1 Rep. 66; *Anon.*, Dyer, 99 b, pl. 64; *Frogmorton* d. *Robinson* v. *Wharrey*, 2 W. Bl. 728, 3 Wils. pp. 125, 144.

to the younger son and the heirs of his body, and, for want of such issue, to the heirs of the body of his elder son, and the younger died without issue in the lifetime of the elder; it was held, that the son of the elder could not take under the devise (*q*).

"The great struggle, however, in cases of this nature, has generally been to determine whether the testator uses the word 'heir' according to its strict and proper acceptation, or in the sense of heir apparent, or in some inaccurate sense.

Heir when construed to mean heir apparent or heir presumptive.

"Sometimes the context of the will shows that he intends the person described as heir to become entitled under the gift in his ancestor's lifetime; the term being used to designate the heir apparent, or heir presumptive (*r*).

"As in the case of *James* v. *Richardson* (*s*), where a man devised lands to A and his heirs during the life of B, in trust for B, and, after the decease of B, to the heirs male of the body of B *now living*, and to such other heirs male or female as B should have of his body, the words 'heirs male of the body now living' were held to be a good description of the son and heir apparent, living at the time of the making of the will, to which period the word 'now' was considered to point (*t*).

Heirs male "now living."

"So, in the case of *Lord Beaulieu* v. *Lord Cardigan* (*u*), a bequest of personal estate to the heir male of the body of A, to take lands in course of descent, being followed by a gift in default of such heir male to A himself for life, the testator was considered to have explained himself to use the words 'heir male' as descriptive of the son or heir apparent.

"Heir at law," held to mean eldest son by force of context.

"Again, in the more recent case of *Carne* v. *Roch* (*x*), where

(*q*) "It will be observed that the failure of the devise in this case is a consequence of the rule which requires that a contingent remainder should vest at the instant of the determination of the preceding estate." (Note by Mr. Jarman.) But see now 40 & 41 Vict. c. 33, *ante*, p. 1418.

* Difference between an heir apparent and heir presumptive.

(*r*) * "The reader scarcely need be reminded of the difference between an heir apparent and an heir presumptive. An heir apparent is the person who will *inevitably* become heir, in case he survives the ancestor. The heir presumptive is a person who will become heir in the same event provided his or her claim is not superseded by the birth of a more favoured object. Thus, if a man has an eldest or only son, such son is his heir apparent. If he has no child, but has a brother or sister, or any other collateral relation, such relation is his heir presumptive, because liable to be postponed by the birth of a child; so if his only issue be a daughter, such daughter, being liable to be superseded by an after-born son, is heir presumptive." (Note by Mr. Jarman.) If the ancestor dies intestate leaving a daughter, and his wife *enceinte* who is afterwards delivered of a son, the daughter takes the rents accrued due in the meantime: *Richards* v. *Richards*, Joh. 754.

(*s*) T. Jon. 99, 1 Vent. 334, 2 Lev. 232, 3 Keb. 832, Pollex. 457, Raym. 330: *Durdant* v. *Burchet*, on same will, Skin. 205, 2 Vent. 311, Carth. 154. See also *Rittson* v. *Stordy*, 3 Sm. & Gif. 230. Where the person was otherwise clearly designated, his being an alien, and consequently (before 33 Vict. c. 14, s. 2) incapable of holding land, did not alter the construction, *S.C.*

(*t*) *Ante*, Chap. XII, p. 392.

(*u*) Amb. 533.

(*x*) 4 M. & Pay. 862, 7 Bing. 226.

a testator gave his real and personal estate to the *heir at law* of A, and in case such heir at law should die without issue, then he devised the same to the *next heir at law of A*, and his or her issue, and in case all the *children* of A should die without issue, then over. A was living at the date of the will, and at the death of the testator; and it was held, that her eldest son had an estate tail under the will.

Remark on *Carne* v. *Roch.*

" In this case, it was probably considered, that the testator had, by the word ' children,' explained himself to use the words ' heir at law ' as synonymous with *eldest son*. And this construction has prevailed in some other cases where the indication of intention was less decisive and unequivocal."

Conflict between the cases.

The construction in question prevailed in *Darbison* d. *Long* v. *Beaumont* (*y*) and *Goodright* d. *Brooking* v. *White* (*z*), in each of which cases the testator referred to the ancestor of the heir in such a way as to lead the Court to infer that by heir he meant heir apparent, while in *Collingwood* v. *Pace* (*a*), and *Doe* d. *Knight* v. *Chaffey* (*b*) " heir " was construed in its technical sense. The question was much discussed in *Doe* d. *Winter* v. *Perratt* (*c*); seven Judges were in favour of the heir apparent, and five in favour of the " first male heir " whose ancestors were dead. It ultimately appeared that the precise point was not before the House, and it was therefore not decided. Lord Brougham remarked that *Darbison* v. *Beaumont* and *Goodright* v. *White* " are less reconcilable with the general current of decision than might have been wished " (*d*).

Gift to true heir of living person is an executory devise.

It is hardly necessary to point out that where in a devise to the heir of A, a person living at the testator's death, " heir " means the true heir of A, and not his heir apparent, the devise is executory, and vests, on the death of A, in the person who is then his heir (*e*).

" Heir," explained by context to denote a person not heir-general.

IV.—The Word " Heir " explained by the Context of the Will to denote a Person who is not the Heir-general.—Mr. Jarman continues (*f*): " Where a testator shows by the context of his

(*y*) 1 P. W. 229; 3 Br. P. C. Toml. 60, *et vide James* v. *Richardson*, *supra*. The question is referred to in Challis, R. P. 114.

(*z*) 2 W. Bl. 1010.

(*a*) O. Bridg. by Ban. 410. Assuming " heir " to have its proper sense, this devise would at the present day be construed as an executory devise to the person who should be the heir of A at his death, and the testator's heir would be entitled during A's life, the old distinction between gifts *per verba de præsenti* and *per verba de futuro* being now exploded, Fea. C. R. 535: *Harris* v. *Barnes*, 4 Burr. 2157.

(*b*) 16 M. & W. 656.

(*c*) *Ante*, p. 1535.

(*d*) 9 Cl. & F., at p. 694.

(*e*) *Post*, p. 1551.

(*f*) First ed., Vol. II, p. 18.

will, that he intends by the term *heir* to denote an individual who is not heir-general, such intention, of course, must prevail, and the devise will take effect in favour of the person described. Thus, if a testator says, 'I make A. B. my sole heir,' or 'I give Blackacre to my heir male, *which is my brother, A. B.*'; this is, it seems, a good devise to A. B., although he is not heir-general (*g*).

"Again (*h*), it is laid down, that 'if a man, having a house or land in borough English, buy lands lying within it, and then, by his will, give his new-purchased lands to his heir of his house and land in borough English, for the more commodious use of it, such heir in borough English will take the land by the devise as *hæres factus*, not *natus* or *legitimus*; for the intent is certain, and not conjectural.' And it is said (*i*), that if a man having lands at common law and other lands in borough English or gavelkind devise his common law lands to his heir in borough English, or heirs in gavelkind, such customary heir or heirs shall take them by the devise, though not heir at common law.

Term "heir" applied by a testator to a devisee.

"So, in the case cited by Lord Hale in *Pybus* v. *Mitford* (*k*), where a man having three daughters and a nephew, gave his daughters £2000, and gave the land to his nephew by the name of his *heir* male, provided that, if his daughters 'troubled *the heir*' the devise of the £2000 should be void; it was adjudged that the devise to the nephew was good, although he was not heir-general; (because the devisor expressly took notice, that his three daughters were his heirs); and that the limitation to the brother's son by the name of heir male was a good name of purchase.

"Next heir" held to denote a person not heir-general.

"Again, in the case of *Baker* v. *Wall* (*l*), where the testator, having issue two sons, devised to A, his eldest son, his farm called Dumsey, to him and his heirs male for ever; adding, 'if a female, my next heir shall allow and pay to her £200 in money, or £12 a-year out of the rents and profits of Dumsey, and shall have all the rest to himself, I mean my next heir, to him and his heirs male for ever.' A died leaving issue a daughter only; and the question now was, whether, in event, C, the youngest son of the testator, was entitled. And the Court held that he was. . . .

(*g*) Hob. 33. See also *Dormer* v. *Phillips*, 3 Drew. 39; *Parker* v. *Nickson*, 1 D. J. & S. 177.

(*h*) Hob. 34. But a devise of customary lands to the *heir* simpliciter gives them to the common-law heir, Co. Litt. 10 a.

(*i*) Pre. Ch. 464, *per* Lord Cowper.

(*k*) 1 Vent., at p. 381.

(*l*) 1 Ld. Raym. 185, Pre. Ch. 468, 1 Eq. Ca. Abr. 214, pl. 12. See also *Rose* v. *Rose*, 17 Ves. 347, where the phrase "my heir under this will" was held, in reference to certain pecuniary legacies, to point to the testator's residuary legatee. See *Thomason* v. *Moses*, 5 Bea. 77, *ante*, p. 455.

"But in the case of *Goodtitle* d. *Bailey* v. *Pugh* (*m*), where the devise was to the eldest son of the testator's only son, begotten or to be begotten, for his life; and the testator added, 'and so on, in the same manner, to all the sons my son may have; if but one son, then all the real estate to him for his life, and for want of heirs in him, *to the right heirs of me* (*the testator*) *for ever, my son excepted, it being my will he shall have no part of my estates, either real or personal.*' The testator left his son and three daughters. The son died without issue, having enjoyed the lands for his life. The daughters contended, that they were the *personæ designatæ* under the devise *to the testator's own right heirs, his son excepted*; for that the son, who was the proper heir, was plainly and manifestly excluded by the express words. And of this opinion were Lord Mansfield and the rest of the Court of King's Bench, who held, that the words were to be interpreted, as if the testator had said, 'Those who would be my right heirs, if my son were dead.' This judgment, however, was reversed in the House of Lords, with the concurrence of the Judges present, who were unanimously of opinion that no person took any estate under the will by way of devise or purchase.

"To the right heirs of me, my son excepted."

"This is an extraordinary decision; and high as is the authority of the Court by which it was ultimately decided, its soundness may be questioned, as the will contains not merely words of exclusion in reference to the son (which, it is admitted, would not alone amount to a devise), but a positive and express disposition in favour of the person who would be next in the line of descent, if the son were out of the way. In this case, we trace but very faintly the anxiety, generally imputed to judicial expositors of wills, *ut res magis valeat quam pereat.*"

Remarks upon *Goodtitle* v. *Pugh*.

But if a person truly answers the special description contained in the will, the fact that he is also heir-general affords no pretext for his exclusion; and therefore where a testator devised the ultimate interest in his property to his right heirs on the part of his mother, his co-heirs at law, who were also his heirs *ex parte materna*, were held entitled under the devise (*n*). It scarcely requires notice that wherever the heir-general is a descendant, or the brother or sister, or descendant of a brother or sister of the testator, he will be heir *ex parte materna* as well as *ex parte paterna*.

Capacity of special heir not affected by his being general heir also.

(*m*) 3 B. P. C. Toml. 454, Butl. Fea. 573, cit. 2 Mer., at p. 348.

(*n*) *Forster* v. *Sierra*, 4 Ves. 766; *Rawlinson* v. *Wass*, 9 Hare, 673. See *Gundry* v. *Pinniger*, 14 Bea. 94, 1 D. M. & G. 502; *Re Willomier's Trusts*, 16 Ir. Ch. R. 389.

"Heirs" may mean "issue."

In *Fowler* v. *Cohn* (*o*), a power to appoint real estate to "the children of A, and their, his or her heirs," was held on the context, to confer a power of appointing to the issue of A's children.

V.—Construction of the Word "Heir" varied by the Nature of the Property.—Mr. Jarman continues (*p*): "It is next to be considered how far the construction of the word 'heir' is dependent upon, or liable to be varied by, the nature of the property to which it is applied.

"Heir" in reference to gavelkind or borough English lands;

"If the subject of disposition be real estate of the tenure of gavelkind, or borough English, or copyhold lands held of a manor in which a course of descent different from that of the common law prevails, it becomes a question, whether, under a disposition to the testator's heir as a purchaser, the intended object of gift is the heir-general at common law, or his heir *quoad* the particular property which is the subject of the devise; and the authorities at a very early period, established the claim of the common law heir (*q*); supposing, of course, that there is nothing in the context to oppose the construction."

—as between *pars paterna* and *pars materna*:

If a testator seised of lands by descent from his mother devises them to his heir, and die leaving different persons his heir *ex parte materna* and his heir *ex parte paterna* (who both claim at common law), the question, which is entitled, will depend on whether the devise is sufficient according to the principles of the old law to break the descent. Thus, in *Davis* v. *Kirk* (*r*), a testator devised all his real estate (part of which had descended to him *ex parte materna*) to a trustee, his heirs and assigns, upon trust to sell part, and to pay the income of the residue to the testator's widow for life, and after her death "upon trust to convey the said residue unto such person as should answer the description of the testator's heir-at-law." It was held by Sir W. P. Wood, V.-C., that the descent was

(*o*) 21 Bea. 360.

(*p*) First ed., Vol. II, p. 21. In reading this section the possible effect of section 132 of the Law of Property Act, 1925, must be borne in mind.

(*q*) Co. Litt. 10 a (devise to heir of stranger); Rob. Gavelk. 117, 118; *Thorp* v. *Owen*, 2 Sm. & Gif. 90 (devise "to male heir" of testator); *Garland* v. *Beverley*, 9 Ch. D. 213 (devise in remainder to "right heir" of testator). See *Polley* v. *Polley*, 31 Bea. 363 (gift to heir of stranger of money to arise by sale of borough English lands). In *Sladen* v. *Sladen*, 2 J. & H. 369, the claim of the common-law heir was fortified by the circumstance that leaseholds were mixed with the gavelkind land in the same set of limitations.

(*r*) 2 K. & J. 391. The will was dated in 1845 and was therefore subject to stat. 3 & 4 Will. 4, c. 106, s. 3—a circumstance noted by the V.-C. on a subsequent occasion, 1 J. & H., at p. 674. But that statute appears to give no help in determining who is the person to take, but only, if the heir *ex parte materna* is found to be the person intended, to direct how he takes it.

broken by the devise, and that the heir *ex parte paterna* was therefore entitled (*s*).

—in reference to personal estate, how construed.

Mr. Jarman continues (*t*): "With respect to the personalty, too, it is often doubtful (*u*) whether the testator employs the term 'heir' in its strict and proper acceptation, or in a more lax sense, as descriptive of the person or persons appointed by law to succeed to property of this description (*y*). Where the gift to the heirs is by way of substitution, the latter construction has sometimes prevailed; an example of which occurs in the case of *Vaux* v. *Henderson* (*z*), where a testator bequeathed to A £200, 'and, failing him by decease before me, *to his heirs*'; and the legacy was held to belong to the next-of-kin of A living at the death of the testator. Sir R. P. Arden, M.R., too, in *Holloway* v. *Holloway* (*a*), was strongly disposed to give the same construction to the word 'heirs' applied to personalty; though his opinion on another question rendered the point immaterial."

"To A. or his heirs" (by substitution).

And a similar decision was made in *Gittings* v. *M'Dermott* (*b*). Of this case Lord St. Leonards observed (*c*) that the gift over was to prevent a lapse: the argument, he thought, was a very fair one, that as the property in one case would have gone to the party absolutely, and from him to his personal representatives, so when the testator spoke there, by way of substitution, of the heirs, it was understood that he meant the same persons who would have taken after him in case there had not been a lapse (*d*). This principle has since been followed in other cases (*e*), including one where real estate was combined with personalty in a gift to the testatrix's sisters as tenants in common for life, or until marriage, with survivorship, and upon the death or marriage of all "to be divided in equal shares

(*s*) See *Moore* v. *Simkin*, 31 Ch. D. 95, where the question whether the descent was broken arose under a settlement by deed executed in 1810.

(*t*) First ed., Vol. II, p. 22.

(*u*) Mr. Jarman means that a doubt may arise from the context, for the general rule, as stated by him (*post*, p. 1547) is that in gifts of personal estate "the word 'heir,' unexplained by the context, must be taken to be used in its proper sense."

(*y*) That is, before 1926, under the Statute of Distribution; including a widow, but not a husband: *Doody* v. *Higgins*, 2 K. & J. 729; and since 1925 presumably, under the Administration of Estates Act, 1925. As to this see Chap. XLI, p. 1580

(*z*) 1 J. & W. 388, n.

(*a*) 5 Ves. 399.

(*b*) 2 My. & K. 69.

(*c*) *De Beauvoir* v. *De Beauvoir*, 3 H. L. C., at p. 557.

(*d*) This is the substance of Lord St. Leonards' remarks, which seem to be inaccurately reported.

(*e*) *Doody* v. *Higgins*, 9 Hare, App. 32, 2 K. & J. 729; *Jacobs* v. *Jacobs*, 16 Bea. 557; *Re Porter's Trust*, 4 K. & J. 188; *Re Philps' Will*, L. R. 7 Eq. 151; *Finlason* v. *Tatlock*, L. R. 9 Eq. 258; *Parsons* v. *Parsons*, L. R. 8 Eq. 260 (perpetual personal annuity); *Neilson* v. *Monro*, 27 W. R. 936; *Re Stannard*, 48 L. T. (N.S.) 660.

between my brothers and sisters then living or their heirs"; it was held by Hall, V.-C., that this limitation to heirs, by way of substitution, contained within itself that which required that the property should go to heirs upon whom the property would devolve by law, that is to say, as to the real estate, the heir-at-law, and as to the personalty, the statutory next-of-kin according to the Statute of Distribution (*f*).

"Heirs and assigns" of deceased person.

So in *Re Newton's Trusts* (*g*), where a testator bequeathed one-seventh of his personal estate "to my brother A his heirs and assigns for ever," another seventh "to my brother B, his heirs and assigns for ever," and so on, and the remaining seventh "to the heirs and assigns for ever of my late sister C now deceased": it was held by Wood, V.-C., that this last was *quasi* substitutional and went to the statutory next-of-kin; that by the previous gift, the testator showed how he supposed personal estate would devolve, and wished to put the representatives of C in the same position as if C had been alive, and her share had thus devolved from her.

"Heirs of the body" construed issue.

Where the substituted gift is to "heirs of the body," such of the next-of-kin of the *propositus* will be entitled as are descended from him, that is, his children or other issue (*h*).

"Heirs" construed "issue."

"Heirs" will also be held to mean issue, if the context requires that construction (*i*).

"To be divided among the heirs of A."

Again, a direction to divide a legacy amongst the heirs of the testator or another person indicates an intention to give concurrent interests to several; which can seldom be satisfied by understanding "heirs" in its primary sense, (which under one person will, with rare exceptions, be entitled to the whole); but which will generally be satisfied by construing "heirs" to mean next-of-kin. Thus, in *Re Steevens' Trusts* (*j*), where a testator directed his trustees to divide a sum of money "amongst the heirs of my late brother J. S." (J. S. being dead leaving one person his heir and the same person and others his next-of-kin), it was held by Bacon, V.-C., that "heirs" meant next-of-kin. And in *Low* v. *Smith* (*k*), where a testator gave all his real and personal estates upon trusts which implied conversion (*l*), and to

(*f*) *Wingfield* v. *Wingfield*, 9 Ch. D. 658, followed in *Keay* v. *Boulton*, 25 Ch. D. 212; *Re Cusin*, [1917] 1 Ir. R. 63. See also *Gray* v. *Gray*, [1915] 1 Ir. R. 261 ("without lawful aires"). See *post*, p. 1548.

(*g*) L. R. 4 Eq. 171.

(*h*) *Pattenden* v. *Hobson*, 22 L. J. Ch. 697; *Price* v. *Lockley*, 6 Bea. 180, ("heirs lawfully begotten"). See also *Re Jeaffreson's Trusts*, L. R. 2 Eq. 276, stated *post*, p. 1543.

(*i*) *Speakman* v. *Speakman*, 8 Hare, 180. See *Fowler* v. *Cohn*, 21 Bea. 360, *ante*, p. 1540.

(*j*) L. R. 15 Eq. 110.

(*k*) 25 L. J. Ch. 503. See *Re Peppitt's Estate*, 36 L. T. 500 ("to be divided amongst my heirs and to their children").

(*l*) By the trust to invest all the shares, see *Affleck* v. *James*, 17 Sim. 121.

Low v. *Smith.*

be divided among his nephews, grand-nephews and nieces, the several shares to be invested and the income applied for their maintenance until the age of twenty-one, "except my grand-nephew A, and he only to receive the interest of his portion until the age of thirty. Afterwards if my executors think him capable of using one-half in his business, let it be done, the remaining half to be continued in the stocks, the income of which he is to receive during his life, and at his death to be equally divided among his legal heirs." It was held by Kindersley, V.-C., that at the death of A his share went to his next-of-kin (*m*).

In the former of these two cases the decision has the additional support of the circumstance that A was, to the testator's knowledge, actually dead at the date of the will, leaving one person his heir and several his next-of-kin. It must, however, be admitted that in neither case were the grounds to which they are here referred distinctly alluded to by the Court. In *Re Steevens' Trusts* the V.-C. treated the authorities as hopelessly confused; while in *Low* v. *Smith* the Court relied on the cases of substitution already noticed, and adverted particularly to the form of the gift, which was in the first place to the grand-nephew, as one of the class absolutely, and was then restricted for the sole apparent purpose of better securing the benefit of it to the legatee himself (*n*).

Re Jeaffreson's Trusts.

The effect of words of distribution is more clearly exemplified in *Re Jeaffreson's Trusts* (*o*), where personalty was bequeathed to trustees in trust for A for life, and after her death "for the benefit of the heirs of the body of A, first to educate at their discretion the said heirs, and lastly to pay to the said heirs the said residue at their respective ages of twenty-one in such proportions as A might by deed or will" appoint. Sir W. P. Wood, V.-C., held that the words "heirs of the body" were not used in the technical sense of all descendants *ad infinitum* and did not operate as words of limitation so as to

(*m*) The V.-C. added: "There is, however, this difficulty about it, which is, that the property will not, in this instance, go equally, but the widow will take one-third and the daughters two-thirds." On this it has been remarked that the difficulty "was apparently put by the Court [as suggesting that reference to the statute, which directs that objects shall take *per stirpes*, could not have been intended, and, consequently,] as an objection (which yet it overcame) to construing 'heirs' in the sense of statutory next-of-kin, not as intimating that, if it was so construed, the objects would not take in equal shares." (Note by Mr. Vincent, in the fourth edition of this work, Vol. II, p. 124.) Compare the cases on gifts to relations, *post*, p. 1601 *seq.*

(*n*) See *White* v. *Briggs*, 2 Phil. 583. In *Smith* v. *Butcher*, 10 Ch. D. 113, the decision in *Low* v. *Smith* was explained as resting on the words of distribution, and Jessel, M.R., appears to have accepted the explanation.

(*o*) L. R. 2 Eq. 276.

give an absolute interest to A (*p*), but indicated the interests of a set of persons co-existing, and that the next-of-kin of A descended from her and living at her death were entitled (*q*).

"Heirs" explained by reason given for making the bequest.

In *Re Gamboa's Trusts* (*r*), where a testator bequeathed a legacy "to the heirs of his late partner for losses sustained during the time that the business of the house was under my sole control," Sir W. P. Wood, V.-C., held that the next-of-kin according to the statute were entitled, founding his decision on the expressed reason of the bequest, which would be unmeaning if the testator intended to benefit the heir strictly so called. "Had it been 'to the heirs of my late partner' simply," added the V.-C., "I should not have felt so clear upon the point."

"Heirs" construed personal representatives.

In *Powell* v. *Boggis* (*s*) in a gift to A for life and after her death "to her heirs as she shall give it by will, and if she die without leaving a will to her right heirs for ever," the phrase "right heirs" was held by Romilly, M.R., to mean executors or administrators, because in other parts of the will the testator had used "heirs" in that sense, but as in two other places in the will he had used "heirs" in the sense of next-of-kin, the reasoning of the M.R. does not seem convincing.

"Heirs or next-of-kin of A deceased."

And here may be noticed a case where a bequest of personalty to "the heirs or next-of-kin of A deceased" was held to be a gift to the next-of-kin of A according to the Statute of Distribution: "or" not signifying an alternative between two classes (which would have made the gift void for uncertainty), but the one description being explanatory of the other (*t*).

Distribution among "heirs" is under the statute.

In a gift to next-of-kin expressly according to the Statutes of Distribution, the statutes not only determine the objects of gift, but also regulate the manner and proportions in which they take (*u*). And a gift to "heirs," where that expression is construed to mean statutory next-of-kin, is brought by the implied reference to the statute under the same rule, except

(*p*) See *ante*, p. 1161.

(*q*) See also *Bull* v. *Comberbach*, 25 Bea. 540, stated below. In *Ware* v. *Rowland*, 15 Sim. 587, 2 Phil. 635, Shadwell, V.-C., expressed an opinion that under a gift at the death of A to "my heirs at law share and share alike" the heir proper was entitled. But as A was both heir-at-law and sole next-of-kin the point did not arise. The words "share and share alike" were referred to in argument for the purpose only of showing that A, a known individual, could not have been intended to take either as heir-at-law or next-of-kin, and that the words imported a class to be ascertained at the death of A; as to which *vide post*. In commenting on *Ware* v. *Rowland*, Bacon, V.-C., in *Re Steevens' Trusts*, drew a distinction between a gift to the testator's own heirs and a gift to the heirs of a stranger, *sed quære*.

(*r*) 4 K. & J. 756.

(*s*) 35 Bea. 535.

(*t*) *Re Thompson's Trusts*, 9 Ch. D. 607. Compare *Re Newton's Trusts*, L. R. 4 Eq. 171, *ante*, p. 1542, where the expression "heirs and assigns" was explained by its previous use as words of limitation.

(*u*) *Post*, p. 1581.

that in the latter case a widow is included as a person entitled under the statute in cases of intestacy (*v*). It does not seem to have been clearly decided whether a direction for equal division will, among "heirs," be given effect to, where "heirs" is construed to mean statutory next-of-kin (*w*).

"Heirs" unexplained, strictly construed in bequests of personalty.

In all the foregoing cases, special grounds were assigned for departing from the proper sense of the word *heirs*; and as Mr. Jarman points out (*x*), they "must not be understood to warrant the general position, that the word *heirs*, in relation to personal estate, imports *next-of-kin*, especially if real estate be combined with personalty in the gift; which circumstance, according to the principle laid down by Lord Eldon in *Wright* v. *Atkyns* (*y*), affords a ground for giving to the word, in reference to both species of property, the construction which it would receive as to the real estate if that were the sole subject of disposition."

A fortiori where realty and personalty combined.

"To my nighest heir at law."

Thus, in *Gwynne* v. *Muddock* (*z*), where a testator gave all his real and personal estate to A for life, adding, after her death "my nighest heir at law to enjoy the same"; Sir W. Grant, M.R., held that the heir at law took both the real and personal estate, not the realty only, the testator having blended them in the gift. Here it will be observed the word used was *heir* in the singular. So in *Tetlow* v. *Ashton* (*a*), where a testator devised and bequeathed his real and personal estate, upon failure of certain previous limitations, to the heir at law of his family whosoever the same might be; Sir J. K. Bruce, V.-C., said, "The testator has used words which no person, professional or unprofessional, can misunderstand. . . . If there were any correcting or explanatory context the case might be different. I give no opinion how the case would have stood if the word 'heirs' had been used instead of 'heir.'" And he held that the next-of-kin had no colour of title.

"Heir at law of my family."

Ultimate remainder to "my own right heirs."

In *De Beauvoir* v. *De Beauvoir* (*b*), the word used was

(*v*) *Jacobs* v. *Jacobs*, 16 Bea. 557; *Low* v. *Smith*, 25 L. J. Ch. 503; *Re Steevens' Trusts*, L. R. 15 Eq. 110; *Wingfield* v. *Wingfield*, 9 Ch. D. 658. And see *Doody* v. *Higgins*, 2 K. & J. 729; *Re Porter's Trust*, 4 K. & J. 188; *Re Thompson's Trusts*, 9 Ch. D. 607.

(*w*) See the remarks on *Low* v. *Smith*, *ante*, p. 1543, n. (*m*).

(*x*) First ed., Vol. II, p. 22.

(*y*) Coop. pp. 111, 123, "See also *Pyot* v. *Pyot*, 1 Ves. sen., 4th ed., 335, where, however, the words of the will being applicable rather to personalty, the construction which obtains, in regard to this species of property, predominated as to both real and personal estate." (Note by Mr. Jarman.) The principle laid down by Lord Eldon does not apply where the gift to the heirs is substitutional, or where the word "heirs" is contrasted with family; see *Wingfield* v. *Wingfield*, 9 Ch. D. 658, stated *ante*, p. 1542; and *per* Lord Cottenham, *White* v. *Briggs*, 2 Phil., at p. 590.

(*z*) 14 Ves. 488.

(*a*) 20 L. J. Ch. 53.

(*b*) 15 Sim. 163, 3 H. L. C. 524.

"heirs" in the plural. A testator devised his estates in the funds of England, and his freehold, copyhold, and leasehold property to several persons and their sons in strict settlement, remainder to his own right heirs; and empowered his trustees to invest the residue of his personal estate in the purchase of freehold land, to be settled to the same uses. It was held by Sir L. Shadwell, V.-C., and on appeal by the House of Lords, that the intention to be collected from the whole will, especially from the power to invest, was to give both realty and personalty, as a blended property, to the same set of persons throughout, and that the whole property therefore went ultimately to the heir-at-law. Lord St. Leonards, after stating the general rule as to personal estate (*c*), said (*d*), "Then we come to the mixed cases. I quite agree that as to them the argument is still stronger against the appellant (the next-of-kin), for if the law is settled when you can collect the intention, as regards personal estate, the argument that it is so must, *a fortiori*, have more operation when you come to blended property, consisting of real and personal estate; for as to so much of the property which consists of real estate there can be no doubt or question but that the person who is described as 'heir' is intended to take in that character. You, therefore at once, in speaking of heir, impress upon the gift, or upon him who is to take it, his own proper character—that of heir. When you are dealing, therefore, with the same disposition, though of another part of the property, you are relieved from the difficulty which you labour under in the more naked case of personal property, and having found that the testator meant what he has expressed as regards that portion which is real property, you may more readily infer the same intention as regards the other portion of the same gift depending upon the same words, and you therefore allow the whole disposition the same operation as you would give to it if it had been confined to real estate alone."

"To my next lawful heirs."

So in *Haslewood* v. *Green* (*e*), where a testator devised and bequeathed to his daughter a house and the interest of £800 for her life, and if she died leaving issue he directed £500 to be paid to them, and that the remainder, that is £300, and the house, should revert to his next lawful heirs; it was held by Sir J. Romilly, M.R., that the case was within *De Beauvoir* v. *De Beauvoir*, and that the heir, and not the next-of-kin, was entitled to the house and the £300.

(*c*) *Vide post*, p. 1547.
(*d*) 3 H. L. C., at p. 557.
(*e*) 28 Bea. 1. See also *In b. Dixon*, 4 P. D. 81, and *Todhunter* v. *Thompson*, 26 W. R. 883 ("my legal heirs").

"Heir" unexplained strictly construed in bequests of personal estate.

Mr. Jarman continues (*f*): "And even where the entire subject of gift is personal, the word 'heir,' unexplained by the context, must be taken to be used in its proper sense." Thus it is laid down (*g*), that if one devise a term of years to J. S., and after his death that the heir of J. S. shall have it; J. S. shall have so many years of the term as he shall live, and the heir of J. S. and the executor of that heir shall have the remainder of the term. So, in *Danvers* v. *Lord Clarendon* (*h*), where a testator bequeathed all his goods in C. house to A. for life, and after her death to the heir of Sir J. D.; the only question raised was whether he that was heir of Sir J. D. at the time of his death or at the time of A.'s death was entitled.

"Nor," adds Mr. Jarman (*i*), "will the construction be varied by the circumstance that the gift is to the heir in the singular, and there is a plurality of persons conjointly answering to the description of heir (*j*). Thus, under the words 'to my heir £4,000,' three co-heiresses of the testator were held to be entitled; Sir J. Leach, M.R., observing, 'Where the word is used not to denote succession, but to describe a legatee, and there is no context to explain it otherwise, then it seems to me to be a substitution of conjecture in the place of clear expression, if I am to depart from the natural and ordinary sense of the word "heir" ' " (*k*).

"Heirs," in the plural, similarly construed.

And although the word used, in a gift of personal estate only, is "heirs" (*l*), in the plural, it will, unless explained by the context, retain its proper sense. Sir R. P. Arden, in *Holloway* v. *Holloway* (*m*), was strongly disposed to construe it next-of-kin; though his opinion on another question rendered the point immaterial. But in *De Beauvoir* v. *De Beauvoir* (*n*), Lord St. Leonards did not approve of this construction. He reviewed the authorities, and without distinguishing between those where the word used was "heir," and others where it was "heirs," said: "As far as the authorities go with respect to personal estate, whether the gift be an immediate gift, or whether it be a gift in remainder, the cases appear to me to be uniform—to

(*f*) First ed., Vol. II, p. 23.

(*g*) Shep. Touch. 446.

(*h*) 1 Vern. 35. See also *Southgate* v. *Clinch*, 27 L. J. Ch. 651, 4 Jur. (N.S.) 428; *Re Rootes*, 1 Dr. & Sm. 228.

(*i*) First ed., Vol. II, p. 23.

(*j*) See 2 Ld. Raym. 829.

(*k*) *Mounsey* v. *Blamire*, 4 Russ. 384. Jessel, M.R., is reported, 10 Ch. D., at p. 114, to have disapproved of this case; but the context would seem to indicate that what he disapproved of was the half-admission, made *argu.* by Sir J. Leach, that in cases of succession "heir" meant next-of-kin.

(*l*) "Heirs-at-law" has been thought less flexible than "heirs," L. R. 15 Eq. p. 113; but see 15 Sim. p. 593.

(*m*) 5 Ves., at p. 403.

(*n*) 3 H. L. C. pp. 524, 557, disapproving of *Evans* v. *Salt*, 6 Bea. 266.

give to the words the sense which the testator himself has impressed upon them—that if he has given to the heir, though the heir would not by law be the person to take that property, he is the person who takes as *persona designata*. It is impossible to lay down any other rule of construction."

One of the authorities noticed by Lord St. Leonards was *Pleydell* v. *Pleydell* (*o*), where a testator, after making several contingent dispositions of a sum of money, gave the ultimate interest to his own right heirs (in the plural); and it was held that the testator's heir was entitled, not his executor.

To several for life, "and on the death of either to his lawful heir or heirs."

And in *Smith* v. *Butcher* (*p*), where personalty was given in trust to be equally divided amongst "the children of A during their lives, and on the decease of either of them his or her share of the principal to go to his or her lawful heir or heirs"; it was held by Jessel, M.R., that the words were not, by analogy to the rule in *Shelley's Case*, to be read as words of limitation, and that neither the next-of-kin, nor the legal personal representatives, of a deceased child were entitled to his share, but his heir-at-law. It will be observed that in *Smith* v. *Butcher*, the "heir or heirs" took by way of remainder, which appears to distinguish that case from *Wingfield* v. *Wingfield* (*q*) and *Keay* v. *Boulton* (*r*), where there was an independent gift by way of substitution to the heirs of deceased children.

Various meanings of "heirs."

In *Powell* v. *Boggis* (*s*) the word "heirs" was used seven times in a will; in two places it was held to mean executors or administrators, in three places it was held to mean next-of-kin, and in one place it was held to mean heir-at-law: in another clause, by which the testator gave personalty to his nephews and nieces "their heirs or assigns," this was held to be an absolute gift to the nephews and nieces.

In *Macpherson* v. *Stewart* (*u*) a testator left all his property, real and personal, to trustees upon trust to invest the same for the benefit of his heirs; it was held that by "heirs" he meant all persons interested under his will, namely, his mother (to whom a life interest was given), two life annuitants, two legatees, and a nephew upon whom the whole residue was ultimately to be settled as real estate in strict settlement.

The construction of "heirs," "right heirs," etc., in an executory trust is treated of elsewhere (*v*).

(*o*) 1 P. W. 748.

(*p*) 10 Ch. D. 113; *Skinner* v. *Gumbleton*, [1903] 1 Ir. R. 36 ("right heirs and assigns"); *Re Bishop and Richardson*, [1899] 1 Ir. R. 71 ("eldest son or heir at law"); *Re Russell*, 52 L. T. 559. See also *Hamilton* v. *Mills*, 29 Bea. 193 (deed).

(*q*) *Ante*, p. 1542.

(*r*) 25 Ch. D. 212.

(*s*) 35 Bea. 535.

(*u*) 28 L. J. Ch. 177.

(*v*) Chap. XLVIII.

Difference between real and personal estate.

Mention may here be made of the general rule that in a bequest of personal estate to A or his heirs, the word " heirs " is read as a word of substitution, so as to prevent a lapse, while in a devise of real estate to A or his heirs the word " or " was, in the case of wills under the old law, read " and," so as to give A the fee (*w*). Since the Wills Act, this reason no longer applies, and it is therefore arguable that in such a devise " heirs " would be read as a word of substitution, so as to give effect to the obvious intention of the testator (*x*).

" Heirs or assigns."

Where personal property is given to a number of persons " or their heirs or assigns," the construction is different, for the addition of " assigns " is taken to show that the testator used the words " or their heirs or assigns " as words of limitation, so that the legatees take absolutely (*y*).

" Heirs and assigns."

If there is a bequest of personal estate to several persons in succession, with an ultimate remainder to the testator's " heirs and assigns," it is hardly necessary to say that the addition of assigns does not affect the construction, and the property goes to the testator's heir-at-law (*z*).

" Heirs " held to mean *children* in regard to personalty.

VI.—The Word " Heirs," etc., when construed " Children."—Mr. Jarman continues (*a*) : " The words ' heirs ' and ' heirs of the body,' applied to personal estate, have been sometimes held to be used synonymously with ' children '—a construction which, of course, requires an explanatory context.

" As, in the case of *Loveday* v. *Hopkins* (*b*), where the words : ' Item, I give to my sister Loveday's *heirs* " £6,000 " ' —' I give to my sister Brady's children equally " £1,000." ' At the date of the will, Mrs. Loveday had two children, one of whom was a married daughter, who afterwards died in the lifetime of the testatrix, leaving three children. Mrs. Loveday was still alive, and her surviving child claimed the legacy. Sir Thomas Clarke, M.R., was clearly of opinion, that the testatrix intended to give the £6,000 to the children of Mrs. Loveday, the same as in the subsequent clause to Brady's children, and had not their descendants in view ; or if she had, yet as she had not expressed herself sufficiently, the Court could not construe the will so as to let them in to take. His Honor, therefore, held the surviving child to be entitled to the legacy."

(*w*) *Ante*, p. 586.
(*x*) *Re Whitehead*, [1920] 1 Ch. 298.
(*y*) *Re Walton's Estate*, 8 D. M. & G. 173; *Powell* v. *Boggis*, 35 Bea. 535. See *per* Shadwell, V.-C., in *Waite* v. *Templer*, 2 Sim., at p. 542, stated *ante*, p. 452. As to devises of real estate to " heirs and assigns," *vide ante*, p. 1528.
(*z*) *Skinner* v. *Gumbleton*, [1903] 1 Ir. R. 36 (" right heirs and assigns ").
(*a*) First ed., Vol. II, p. 23.
(*b*) Amb. 273.

And in *Bull* v. *Comberbach* (*c*), where a testator devised lands to trustees in trust for six persons equally for their lives, and after the death of all, in trust to sell the land and divide the money equally "amongst their several heirs," Sir J. Romilly, M.R., held that heirs meant children. He said, "I am at a loss to conceive why he should direct the property to be sold, except for the purpose of division amongst a larger class than the tenants for life; he does not think that six persons are too many to hold and enjoy it in common, but he does think it necessary to direct that after their deaths it shall be sold for the purpose of division." And added, "Where there is a gift of personalty to one for life, and after his death amongst his 'heirs,' I should have no doubt that the expression 'heirs' would apply to children."

Same construction applied in the case of real estate.

This construction is equally applicable to a devise of real estate. Thus, in *Milroy* v. *Milroy* (*d*), where a testator, after giving a life interest to his daughter, and directing that after her death the proceeds of his real and personal estate should be applied for the benefit of her children during their minority, and that afterwards the personalty should be assigned to them, ordered his trustees to convey his freehold and leasehold estates to "the heir or heirs who should be legally entitled to the same"; but, in case his daughter left no children, he gave all the property over; Sir L. Shadwell, V.-C., thought the words "heir or heirs" evidently meant the children of the daughter.

Heirs of the body.

The expression "heirs of the body" will also be held to mean children, where the context requires that construction (*e*).

At what period the heir is to be ascertained.

VII.—Period at which the Object of a Devise to the Heir is to be ascertained.—What is the period at which the object of a devise to the heir is to be ascertained, is a question of frequent occurrence, in the determination of which, the rule that estates shall be construed to vest at the earliest possible period consistent with the will, bears a principal part. An immediate devise to the testator's own heir vests, of course, at his death, and the interposition of a previous limited estate to a third person does not alter the case. Thus, in *Doe* d. *Pilkington* v. *Spratt* (*f*), where a testator devised to his son A and M his wife, and B and N his wife, or the survivor of them, for their lives, with remainder

Gift to testator's heir.

(*c*) 25 Bea. 540. No claim was made for next-of-kin other than children. See also *Roberts* v. *Edwards*, 33 Bea. 259. "Heirs" sometimes means issue and not children only, see *ante*, p. 1542.

(*d*) 14 Sim. 48. See also *Micklethwait* v. *Micklethwait*, 4 C. B. (N.S.) 790. And compare *Spence* v. *Handford*, 27 L. J. Ch. 767, 4 Jur. (N.S.) 987.

(*e*) *Symers* v. *Jobson*, 16 Sim. 267; *Gummoe* v. *Howes*, 23 Bea. 184. *Fowler* v. *Cohn*, 21 Bea. 360, *ante*, p. 1540 (where "heirs" was construed "issue"). See also *Speakman* v. *Speakman*, 8 Hare, 180.

(*f*) 5 B. & Ad. 731. See also *per* Bayley, J., *Doe* v. *Martyn*, 8 B. & Cr., at p. 511; *Re Maher*, [1909] 1 Ir. R. 70.

to the male heir of him the said testator, his heirs and assigns for ever, the remainder was held to vest at the testator's death in his eldest son C, who was his male heir-at-law at that time.

A similar decision was come to in *Re Frith* (*g*).

Gift to the heir of a stranger.

On the same principle, an executory gift to the heir of another person vests as soon as there is a person who answers that description, namely, at the death of the person named; and if the gift is postponed till the determination of a limited interest given to a third person, still the death of the *propositus* is the time for ascertaining the person of the devisee. Thus, in *Danvers* v. *Earl of Clarendon* (*h*), where goods were bequeathed to A for life, remainder to the heir of B, B having died in A's lifetime, the question was, whether the person to take the remainder was he who was B's heir at his death or at the death of A, and judgment was given in favour of the former.

Same rule as to real and personal estate.

This case also shows, that though the rule which requires the earliest possible vesting of an interest so given in remainder is, in a great measure, founded on a reason applicable only to legal estates in real property; namely, that it is (or was) in the power of the owner of the prior particular estate to defeat a contingent remainder (*i*); yet that the rule also holds good generally with regard to personal property for the purposes of the present question.

Previous devise to the heir out of same property no cause for an exception.

And since a departure from the rule leads to frequent inconveniences, slight circumstances or conjectural probability will not prevent an adherence to it. Thus it is not enough that the heir has an express estate in the same property limited to him in a previous part of the will. In *Rawlinson* v. *Wass* (*j*), under a devise in trust for the testator's daughter (who was his heir-at-law) for life, remainder as she should appoint, and, in default of appointment, for the testator's heirs and assigns, as if he had died intestate, the daughter was held entitled to an immediate conveyance of the estate from the trustees. It is true, the words "as if he had died intestate" point expressly to the period of the testator's death, and in an even balance of arguments must weigh in favour of the general rule (*k*). But this ground was wanting in other cases, in which, nevertheless, the express provision for the heir, though aided by other circumstances, was held insufficient to exclude the general rule (*l*).

(*g*) 85 L. T. 455 ("heir at law"); *Re Baker*, 79 L. T. 343 ("right heirs"); *Owen* v. *Gibbons*, [1902] 1 Ch. 636 ("right heirs").

(*h*) 1 Vern. 35.

(*i*) Vide *ante*, p. 1417.

(*j*) 9 Hare, 673.

(*k*) *Doe* v. *Lawson*, 3 East, 278; *Jenkins* v. *Gower*, 2 Coll. 537; *Smith* v. *Smith*, 12 Sim. 317; *Southgate* v. *Clinch*, 27 L. J. Ch. 651.

(*l*) *Boydell* v. *Golightly*, 14 Sim. 327; *Wrightson* v. *Macaulay*, 14 M. & W. 214; *Re Grayson*, 48 L. J. Ch. 354.

What is sufficient to cause a departure from the rule.

However, the intention of the testator prevailed in *Doe* d. *King* v. *Frost* (*m*); there a testator devised lands to his son W. (who was his heir apparent) in fee, and if he should have no children, child or issue, "the said estate is, on his decease, to become the property of the heir-at-law, subject to such legacies as W. may leave by will to the younger branches of the family"; and it appeared that at the date of the will, the testator had a daughter who had five children; it was held that the person who at the time of the decease of W., without issue, should then be the heir-at-law of the testator, was the person entitled under the executory devise. This decision was based on the state of the family, to which the testator was thought to be specifically referring, and on the consideration that W. himself could not have been meant, since that would make the executory devise nugatory, and the power to give legacies unnecessary.

Devise to the person who shall be heir at a future time.

Of course, if the contingency of the devise consists in the uncertainty of the object, as if lands be devised to the person who shall, at a specified time, be the testator's heir of the name of H., no person will be duly qualified to take under the will unless he bears the name at that time (*n*).

Death of devisee intestate.

If a person takes land under a devise to him as heir of the testator, then on his decease intestate descent is traced from him (*o*); but if a testator devises land to the heir, or the heir of the body, of J. S., and the person so entitled dies intestate, descent is traced from J. S. (*p*).

(*m*) 3 B. & Ald. 546. (The gift over was held to be an executory devise in the event of the son dying without leaving issue *at his death*, *post*, p. 1914. See also *Locke* v. *Southwood*, 1 My. & C. 411; *Cain* v. *Teare*, 7 Jur. 567; and the analogous cases on devises and bequests to next-of-kin in the next chapter.

(*n*) *Wrightson* v. *Macaulay*, 14 M. & Wel. 214 (answer to second question); *Thorpe* v. *Thorpe*, 1 H. & C. 326.

(*o*) *Owen* v. *Gibbons*, [1902] 1 Ch. 636.

(*p*) Inheritance Act, 1833, s. 4.

CHAPTER XLI.

GIFTS TO FAMILY, DESCENDANTS, ISSUE, ETC.

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I.—Gifts to Family.—"The word *family*," Mr. Jarman remarks (*a*), "has been variously construed, according to the subject-matter of the gift and the context of the will (*b*). Sometimes the gift has been held to be void for uncertainty.

Construction of the word "family,"

"As, in *Harland* v. *Trigg* (*c*), where a testator gave leasehold estates to his brother, 'J. H. for ever, hoping he will continue them in the family,' Lord Thurlow thought it too indefinite to create a trust, as the words did not clearly demonstrate an object. The testator's brother was tenant for life in remainder, with remainder to his issue in strict settlement, of some freehold lands, and the testator had given some other leaseholds to the same uses; and it was contended, that the leaseholds in question were intended to be subject to the same limitations, so far as the nature of the property would admit; but his Lordship considered that this was not authorised. He said, the testator understood how to make his estates liable to those uses and intended something different here.

Gifts to "family," when void for uncertainty.

"So, in *Doe* d. *Hayter* v. *Joinville* (*d*), where a testator devised and bequeathed residuary real and personal estate to

(*a*) First ed., Vol. II, p. 25.
(*b*) See *Sinnott* v. *Walsh*, 5 L. R. Ir. 27.
(*c*) 1 Br. C. C. 142. His lordship also considered that the expression "hoping" was precatory not imperative See *ante*, pp. 842 *seq.*
(*d*) 3 East, 172; *Re Cullimore's Trusts*, 27 L. R. Ir. 18.

his wife for life, and, after her decease, one-half to his wife's 'family,' and the other half to his 'brother and sister's family,' share and share alike; and it appeared that, at the date of the will, the testator's wife had one brother who had two children, and the testator had one brother and one sister, each of whom had children, and there were also children of another sister, who was dead. Upon these facts, it was held, that both the devises were void, from the uncertainty in each case as to who was meant by the word 'family'; and in the latter case, also, from the uncertainty whether it applied to the family as well of the deceased, as of the surviving sister; and also whether it referred to the brother; which, however, the Court thought it did not.

Word "family" rejected.

"Again, in the more recent case of *Robinson* v. *Waddelow* (*e*), where a testatrix, after bequeathing certain legacies, in trust for her daughters, who were married, free from the control of any husband for life, and, after their decease, for their respective children, gave the residue of her effects to be equally divided between her said daughters *and their husbands and families*; Sir L. Shadwell, V.-C., after remarking that, as, in the gift of the legacy, 'any' husband extended to future husbands, in the bequest of the residue the word 'husbands' must receive the same construction, declared his opinion to be, that such bequest as to the husbands and families was void for uncertainty. 'The word "family,"' said his Honor, 'is an uncertain term; it may extend to grandchildren as well as children. The most reasonable construction is to reject the words "husbands and families."' It was accordingly decreed that the daughters took the residue absolutely as tenants in common (*f*).

"It will be observed, that, in *Harland* v. *Trigg*, and *Robinson* v. *Waddelow*, the subject of gift was personal estate; and in *Doe* v. *Joinville*, it consisted of both real and personal property, and not of real estate exclusively—a circumstance which we shall see has been deemed material.

"Family" synonymous with *heir* in devise of realty by itself.

"Sometimes the word *family* or 'house' (which is considered as synonymous) has been held to mean 'heir.' A leading authority for this construction is the often cited proposition of Lord Hobart, in *Counden* v. *Clerke* (*g*), that if land be devised to a stock, or family, or house, it shall be understood of the heir principal of the house."

(*e*) 8 Sim. 134. "I cannot say that that case is quite satisfactory to my mind," *per* Lord Cranworth, V.-C., 1 Sim. (N.S.), at p. 246. See also *Stubbs* v. *Sargon*, 2 Kee. 255, *ante*, p. 457.

(*f*) "No doubt the testator's real intention was to assimilate the residuary bequest to the legacies; but the V.-C. seems to have considered that this hypothesis savoured too much of mere conjecture." (Note by Mr. Jarman.)

(*g*) Hob. 29.

And this construction has been adopted in other cases, where the gift was one of real estate by itself (*h*).

"Family" held to mean heir apparent.

In *Doe* d. *Chattaway* v. *Smith* (*i*), the word "family," applied to real estate, was construed to mean heir apparent. A very illiterate testator devised lands into his sister C.'s family, to go in heirship for ever; and it was held, that the eldest son and heir apparent of C. was entitled, though it was admitted that the word "family," in another part of the will, and applied to personal property, meant children; the Court thinking it no objection, that the same word, when elsewhere applied to a different subject, would receive a different construction.

"Nearest family" held to mean heir.

In *Griffiths* v. *Evan* (*j*), where a testator devised to his daughter in tail, with power to her, in default of issue, to appoint to the testator's "nearest family"; it was held, that this was a power to appoint to the heir.

"Family according to seniority" construed heirs of the body.

In *Lucas* v. *Goldsmid* (*k*), where a testator devised real estate, "to be equally divided between my two sons, who shall enjoy the interest thereof, and then go to their respective families according to seniority," it was held that the sons were entitled as tenants in common in tail.

"Family" construed "children" in devise of realty.

As will presently be mentioned, the popular use of "family" as meaning "children" has been recognised by the Courts in the case of bequests of personal estate, and it will be so construed even in devises of real estate, if the context requires. Thus, in *Burt* v. *Hellyar* (*l*), where a testator devised his real and personal estate to his wife for life, and after her death "to his son C. and to his heirs; in case C. should die leaving no issue, then my freehold estate shall be equally divided among my surviving children or their families," Wickens, V.-C., held, that "families" meant "children."

In bequests of personalty or in mixed gifts, "family" means "children."

In a bequest of personalty (including, of course, the proceeds of sale of real estate (*m*)), or a mixed gift of realty and personalty (*n*), the primary meaning of "family" is children (*o*). Whether they take *per stirpes* or *per capita*, as joint tenants or as

(*h*) *Wright* v. *Atkyns*, 17 Ves. 255; 19 Ves. 299; Coo. 111; T. & R. 143, in which the earlier authorities were discussed, including *Chapman's Case*, Dyer, 333 b.

(*i*) 5 M. & Sel. 126.

(*j*) 5 Bea. 241.

(*k*) 29 Bea. 657.

(*l*) L. R. 14 Eq. 160.

(*m*) *Woods* v. *Woods*, 1 My. & C. 401. *Reay* v. *Rawlinson*, 29 Bea. 88.

(*n*) As to the effect of a trust to settle real and personal property for the benefit of a person and his family, see *White* v. *Briggs*, 15 Sim. 17, 2 Ph. 583, *ante*, p. 883.

(*o*) *Re Terry's Will*, 19 Bea. 580; *Pigg* v. *Clarke*, 3 Ch. D. 672 (gift to the testator's family); *Re Muffett*, 55 L. T. 671; *Sinnott* v. *Walsh*, 5 L. R. Ir. 27; *Re McCann*, [1916] 1 Ir. R. 255.

tenants in common, depends upon the form of the gift. Thus under a gift to A and B and their respective families, if any, one half goes to A and his children living at the testator's death as joint tenants, and the other half goes in like manner to B and his children (*p*). So if property is given to the testator's brothers and sisters in equal shares, "and to the families of such of them as shall be then dead" (that is, at the period of distribution), the children of the brothers and sisters take *per stirpes* and as joint tenants *inter se* (*q*). But if the gift is simply "to the families of X and Y," the children of X and Y take *per capita*, and not *per stirpes* and as joint tenants (*r*). In *Barnes* v. *Patch* (*s*), where a testator gave his real and personal estate to be equally divided between L and E's families, the children of L and E took *per capita*, but whether as joint tenants or as tenants in common, does not appear. In *Owen* v. *Penny* (*t*), under a gift to the family of A, it was held that the children of A took as tenants in common.

"Family" does not include parents.

Where the gift is to the families of named persons, the parents are excluded (*u*). It may also be laid down, as a general rule, that a gift to the "family" of a particular person does not include a husband (*v*), a wife (*w*), or collateral relations (*x*), or descendants of children, whether living or dead (*y*).

Illegitimate children.

A gift to the children of A does not include his illegitimate children, but under a power to appoint to the family of A, an appointment in favour of his illegitimate child has been upheld (*z*).

Where "family" construed "relations."

The word "family" has also been construed as synonymous with "relations." Thus, in *Cruwys* v. *Colman* (*a*), where a testa-

(*p*) *Re Parkinson's Trust*, 1 Sim. (N.S.) 242. See *Morton* v. *Tewart*, 2 Y. & C. C. C. 67.

(*q*) *Re Battersby's Trusts*, [1896] 1 Ir. R. 600.

(*r*) *Gregory* v. *Smith*, 9 Ha. 708; *Commissioners of Charitable Donations* v. *Deey*, 27 L. R. Ir. 289.

(*s*) 8 Ves. 604.

(*t*) 14 Jur. 359.

(*u*) *Gregory* v. *Smith*, 9 Ha. 708; *Re Mulqueen's Trusts*, 7 L. R. Ir. 127.

(*v*) *M'Leroth* v. *Bacon*, 5 Ves. 159. In this case an appointment in favour of a husband was upheld on the special terms of the will.

(*w*) *Wood* v. *Wood*, 3 Ha. 65; *Re Hutchinson and Tenant*, 8 Ch. D., at p. 542, *per* Jessel, M.R.

(*x*) *Wood* v. *Wood*, *supra*.

(*y*) *Gregory* v. *Smith*, 9 Ha. 708; *Burt* v. *Hellyar*, L. R. 14 Eq. 160; *Pigg* v. *Clarke*, 3 Ch. D. 672.

(*z*) *Humble* v. *Bowman*, 47 L. J. Ch. 62; *Lambe* v. *Eames*, L. R. 6 Ch. 597; *Re Keighley*, [1919] 2 Ch. 388 (my people).

(*a*) 9 Ves. 319. See also *Grant* v. *Lynam*, 4 Russ. 292; *Re Maxton*, 4 Jur. (N.S.) 407. But a trust "for such of her own family" as A (a spinster) should appoint does not confine the *selection* to statutory next-of-kin: *Cruwys* v. *Colman*, 9 Ves. 319; *Grant* v. *Lynam*, 4 Russ. 292; *Snow* v. *Teed*, L. R. 9 Eq. 622. And in *Williams* v. *Williams*, 1 Sim. (N.S.) 358, where the testator drew a distinction between "children" and "family," it was held that the latter word included descendants of every degree. See *ante*, p. 795.

trix, after bequeathing her property to her sister, a spinster, for life, whom she made executrix, declared it to be her desire, that she (the sister) should bequeath "at her own death, to those of her own family, what she has in her own power to dispose of that was mine." Sir W. Grant, M.R., held, that the expression "of her own family," was equivalent to "of her own kindred," or "her own relations"; and she, not having exercised the power, it was, therefore, a trust for her next-of-kin, excluding all beyond the statutory limit.

It is observable with respect to the two sets of cases last referred to that where the word "family" was construed to mean children, no one was interested in insisting on its receiving the more enlarged signification of relations; and on the other hand that where it was construed to mean next-of-kin, there were no children (*b*), and the situation of the parties made it improbable that there should be any, or that the birth of any was contemplated. Every case, however, must depend upon its particular circumstances. "Family" is not a technical word, and is of flexible meaning (*c*). It may mean ancestors (*d*). "In one sense it means the whole household, including servants and perhaps lodgers (*e*). In another it means everybody descended from a common stock, *i.e.*, all blood relations; and it may perhaps include the husbands and wives of such persons (*f*). In the sense I have just mentioned the family of A includes A himself; A must be a member of his own family (*g*). In a third sense the word includes children only; thus when a man speaks of his wife and family he means his wife and children. Now every word which has more than one meaning, has a primary meaning; and if it has a primary meaning, you want a context to find another. What then is the primary meaning of 'family'? It is 'children': that is clear upon the authorities which have been cited; and independently of them I should have come to the same conclusion" (*h*).

Jessel, M.R.

It should seem, then, that a gift to the "family" either of

General remark on preceding cases.

(*b*) See this circumstance mentioned as making "children" an improbable construction, by Romilly, M.R., 19 Bea. 581. It would appear from *Re Hutchinson and Tenant*, 8 Ch. D. 540, and *Sinnott* v. *Walsh*, 5 L. R. Ir. 27. that a power to appoint among "the family" of A means his children if he has any.

(*c*) *Per* Kindersley, V.-C., *Green* v. *Marsden*, 1 Drew, at p. 651.

(*d*) *Per* Romilly, M.R., *Lucas* v. *Goldsmid*, 29 Bea., at p. 660. And see *James* v. *Lord Wynford*, 2 Sm. & G. 350, where upon a devise of lands "except such as I may derive from A or from any of her family," A's father was held included in her "family."

(*e*) But a very improbable sense in a bequest to a man's "family."

(*f*) See *M'Leroth* v. *Bacon*, 5 Ves. 159; *Blackwell* v. *Bull*, 1 Kee. 176.

(*g*) But this is not the general rule in a gift to A and his family, *Barnes* v. *Patch*, 8 Ves. 604, stated *supra*, p. 1556; *Gregory* v. *Smith*, 9 Hare, 708

(*h*) *Per* Jessel, M.R., *Pigg* v. *Clarke*, 3 Ch. D., at p. 674.

the testator himself, or of another person, will not be held to be void for uncertainty, unless there is something special creating that uncertainty (*i*). The subject-matter and the context of the will are to be taken into consideration, and generally where personal estate is given to A and his family, the word "family" will not be rejected as surplusage (*j*), or (which amounts to the same thing) treated as a word of limitation, but will give a substantive interest to the children (*k*) or other persons indicated.

"To A and his family."

Gift to the "younger branches" of a "family."

Whether effect can be given to a devise to the "younger branches of a family" must of course chiefly depend on the state of the family at the date of the will. In *Doe* d. *Smith* v. *Fleming* (*l*), where a testator disposed of the ultimate remainder of his estates to the *younger branches of the family of* A and their heirs as tenants in common, and in default of such issue to the elder branches of the same family and their heirs as tenants in common. There were living at the date of the will, and of the testator's death, two daughters of A, four children of one of those daughters and children of two deceased sons of A, and the devise being thus ambiguous was held void. But in *Doe* d. *King* v. *Frost* (*m*), where a testator devised his real estates to his son W. in fee; but if he should die without issue living at his decease (which happened) to I. S., "subject to such legacies as W. might leave to any of the younger branches of the family": and it appeared that besides his only son W. the testator had issue one daughter, who at the date of the will had five children; Abbott, C.J., and Bayley, J., agreed that by the term "the younger branches of the family," the testator means his daughter's younger children: the daughter herself and her eldest son being in the event contemplated successive heirs apparent to W., and therefore excluded from any claim to the legacies.

II.—Gifts to Descendants.—A gift to "descendants" receives a construction answering to the obvious sense of the term; namely, as comprising issue of every degree (*n*).

(*i*) See *Yeap Cheah Neo* v. *Ong Cheng Neo*, L. R. 6 P. C. 381; *Re Cullimore's Trusts*, 27 L. R. Ir. 18.

(*j*) See *Robinson* v. *Waldelow*, 8 Sim. 134 (stated *ante*, p. 1554), where this construction prevailed.

(*k*) *Parkinson's Trust*, 1 Sim. (N.S.) 242; *Beales* v. *Crisford*, 13 Sim. 592. On the question whether children take concurrently with their parent, or in remainder, vide *post*, pp. 1873 *seq.*

(*l*) 2 C. M. & R. 638.

(*m*) 3 B. & Ald. 546.

(*n*) *Ralph* v. *Carrick*, 11 Ch. D. 873; *Re Morgan*, [1893] 3 Ch. 222; *Re Sleeman*, [1929] W. N. 16. As to powers to appoint to descendants, see *ante*, p. 795. "Offspring" has the same primary meaning, but is sometimes construed as meaning "children," *post*, p. 1586, n. (*i*).

Descendants.

In *Crossly* v. *Clare* (*o*), a devise of real estate "to the descendants of A now living in or about B, or hereafter living anywhere else," and a bequest of personalty in the same words, were held to apply to all who proceeded from A's body, so that grandchildren and great grandchildren were entitled, and a great great grandchild was not included, only because born after the date of the will, the words "now living" excluding him. In *Legard* v. *Haworth* (*p*) the word "descendants" was held to refer to children and grandchildren who were objects of an antecedent gift.

"Relations by lineal descent."

In *Craik* v. *Lamb* (*q*), where a testator gave the residue of his real and personal property "unto and equally amongst all his relations who might prove their relationship to him by lineal descent"; it appeared that the testator was a widower, and had no issue, but several first cousins, his next-of-kin, and it was held by Sir J. K. Bruce, V.-C., that, as the testator had not required his devisees to prove their descent from him, he might be understood to mean lineal descent from a common progenitor, and therefore that his cousins were entitled to the residue.

Whether collaterals may be included.

But if the person to whose descendants the gift is made is specified, it would seem to require a strong case to enable collateral relations to participate. In *Best* v. *Stonehewer* (*r*), Romilly, M.R., held that by a gift to descendants of J. S., the testator meant "collateral descendants" (children and grandchildren of a brother) of J. S. The M.R. seems to have been misled by the use of the word "descent" in the law of inheritance (*s*). Sir J. K. Bruce, L.J., dissented from the construction put on the will by the M.R.; and it was not approved by Sir G. Turner, L.J., though he upheld the decision on distinct ground (*t*).

Gift to descendants; they take *per capita*.

"Under a gift to descendants *equally*," says Mr. Jarman (*u*), "it is clear that the issue of every degree are entitled *per capita*, *i.e.* each individual of the stock takes an equal share concurrently with, not in the place of, his or her parent (*v*). And even where the gift is to descendants simply, it seems that the same mode

(*o*) Amb. 397, 3 Sw. 320, n. See *Re Flower*, 62 L. T. 216; 63 L. T. 201.
(*p*) 1 East, 120.
(*q*) 1 Coll. 489.
(*r*) 34 Bea. 66, 2 D. J. & S. 537.
(*s*) Co. Lit. 10 b, 13 b, 237 a; 2 Bl. Com. Ch. xiv. If the meaning of a gift to "descendants" is to be determined by the meaning of "descent," it might, since the Inheritance Act, 1834, include not only collaterals, but father, grandfather, etc.
(*t*) He read the will (*diss.* K. Bruce L.J.) as describing not one set of persons, but two; first, descendants of J. S.; secondly, those whose kindred with the testator originated from J. S.
(*u*) First ed., Vol. II, p. 32.
(*v*) *Butler* v. *Stratton*, 3 B. C. C. 367.

CHAPTER XLI.

of distribution prevails; unless the context indicates that the testator had a distribution *per stirpes* in his view.

Contrary intention.

"Thus, in *Rowland* v. *Gorsuch* (*w*), where the testator, as to the residue of his fortune, willed that the descendants *or representatives* of each of his first cousins deceased should partake in equal shares with his first cousins then alive; Sir Lloyd Kenyon, M.R., considered that the gift applied to first cousins, and all persons who were descendants of first cousins, and who, in quality of descendants, would be entitled, under the Statute of Distribution, to represent them. He had some doubt whether they were to take *per capita*, or *per stirpes*; but upon the whole, he thought that no person taking as representative could take otherwise than as the statute gives it to representatives, *i.e. per stirpes*."

Reference to statute.

So if descendants are expressly desired to take in the proportions directed by the statute, they cannot take concurrently with, but only in the place of, their parents (*x*). And in one case (*y*), where a testator gave the residue of his real and personal property to his wife for life, and after her death to the brothers and sisters of himself and his said wife and to their descendants in such proportions as she should by will appoint, an intention was held to be implied that no descendants should take but by substitution for a parent (brother or sister) who died before the wife (*z*).

Substitution.

And where the gift to descendants is substitutional, or quasi-substitutional, independently of the Statute of Distribution, the general rule is that they take *per stirpes* (*a*).

Re Hickey.

In *Re Hickey* (*b*) the testator gave a legacy to "the descendants of A or their descendants living at my death." It was held that this was a gift of five-sixths of the legacy to the five children of A who survived the testator as tenants in common and the remaining one-sixth to the children of a son of A (who was dead at the date of the will) who survived the testator as joint tenants.

Mode of division *per stirpes.*

Where the distribution is to be *per stirpes*, the principle of representation will be applied through all degrees, children never

(*w*) 2 Cox, 187.
(*x*) *Smith* v. *Pepper*, 27 Bea. 86, marg. note.
(*y*) *Tucker* v. *Billing*, 2 Jur. (N.S.) 483.
(*z*) Compare *Dick* v. *Lacy*, 8 Bea. 214, where property was given to A for life and after her decease "to her nieces and their descendants *per stirpes*"; it was held that the nieces took absolutely and that their issue took nothing, the gift to them being by substitution. And compare the cases on gifts to "issue," *post*, p. 1561; and "children," *post*, p. 1689.
(*a*) *Ralph* v. *Carrick*, 11 Ch. D. 873, stated *post*, p. 1570. See the cases on gifts to issue, *post*, p. 1564.
(*b*) [1917] 1 Ch. 601.

taking concurrently with their parents (*c*). In a case (*d*) where the gift was "to the descendants of A and B *per stirpes*," Romilly, M.R., thought A and B were the *stirpes* in the first instance to be considered, so that the primary division should be into two parts. But Lord Westbury held that you must look to the number of families or *stirpes* descended either from A or B and existing at the testator's death, and divide the fund primarily into a corresponding number of parts. However, in a subsequent case the M.R. acted on his own opinion (*e*). If the gift were to the descendants of one person, *per stirpes*, it must necessarily be dealt with on Lord Westbury's principle.

Re Wilson.

The mode of division according to Lord Westbury's decision was preferred by North, J., in *Re Wilson* (*f*). In that case a testator gave a fund, subject to a life interest therein of his wife, in trust for his cousins, the children of the testator's deceased aunts and uncles named in the will, living at the determination of the life interest, and the issue then living, if any, of his said cousins then dead, according to the stocks. It was held that the "stocks" were the cousins, living and deceased, themselves, and not the aunts and uncles.

Re Alexander.

In *Re Alexander* (*g*), Sargant, J., discussed the conflict of authority, and considered that *Re Wilson* (*h*) and *Re Dering* (*i*) showed that *Robinson* v. *Shepherd* (*k*) was (in a Court of first instance) to be preferred to *Gibson* v. *Fisher* (*l*). In *Re Alexander* the stirpital division was confined to the stocks of nephews and nieces (who were the earliest class of takers) rather than to the stocks of the testator's brothers and sisters.

Whether "descendants" can mean children.

It is possible that a clear context might require "descendants" to be construed as meaning "children": as is sometimes done in the case of the word "issue" (*m*). But "descendants" is less flexible than "issue" (*n*).

Bequest to "issue," how construed.

III.—Gifts to Issue:—(i) "*Issue*" *properly means Descendants of every Degree; Mode of Division.*—Mr. Jarman continues (*o*): "The word issue, when not restrained by the context, is co-extensive and synonymous with descendants,

(*c*) *Ralph* v. *Carrick*, *supra*, n. (*a*); *Re Rawlinson*, [1909] 2 Ch. 36.
(*d*) *Robinson* v. *Shepherd*, 32 Bea. 665; 4 D. J. & S. 129.
(*e*) *Gibson* v. *Fisher*, L. R. 5 Eq. 51. See also *Dick* v. *Lacy*, 8 Bea. 214, *ante*, note (*z*); *Booth* v. *Vicars*, 1 Coll. 6.
(*f*) 24 Ch. D. 664.
(*g*) [1919] 1 Ch. 371.
(*h*) 24 Ch. D. 664.
(*i*) 105 L. T. 404.
(*k*) 4 D. J. & S. 129.
(*l*) L. R. 5 Eq. 51.
(*m*) *Post*, p. 1568. See *Re Hickey*, [1917] 1 Ch. 601.
(*n*) *Ralph* v. *Carrick*, 11 Ch. D. 873.
(*o*) First ed., Vol. II, p. 33.

comprehending objects of every degree (*p*). And here the distribution is *per capita*, not *per stirpes*. The case of *Davenport* v. *Hanbury* (*q*) presents a simple example. The bequest was to M., or her issue. M. died in the lifetime of the testator, leaving one son living, and two children of a deceased daughter. Sir R. P. Arden, M.R., held, that these three objects were entitled *per capita*; and, there being no words of severance, they took as joint tenants" (*r*).

In *Leigh* v. *Norbury* (*s*), Grant, M.R., said it was clearly settled, that the word "issue," unconfined by any indication of intention, includes all descendants. Intention, he said, was required for the purpose of limiting the sense of that word to children (*t*).

It will be remembered that we are here dealing with cases in which the issue take by direct gift, as purchasers. Where the gift is to A "and" his issue, or to A "or" his issue, and A dies before the testator, the question arises whether the gift to the issue is substitutional (*u*); if A survives the testator other considerations may arise. Different rules apply according to whether the gift is of real estate only (*w*), or of personal estate only (*x*), or of real and personal estate together (*y*).

Devise of real estate to issue.

"It will be perceived," says Mr. Jarman (*z*), "that, in all the preceding cases, the subject of disposition was personal

(*p*) *Haydon* v. *Wilshere*, 3 T. R. 372; *Hockley* v. *Mawbey*, 1 Ves. jun. 143; *Wythe* v. *Thurlston*, Amb. 555; 1 Ves. sen. 196, more correctly at 3 Ves., p. 258; *Horsepool* v. *Watson*, 3 Ves. 383; *Bernard* v. *Mountague*, 1 Mer. 422; *Hall* v. *Nalder*, 22 L. J. Ch. 242; *South* v. *Searle*, 2 Jur. (N.S.) 390; *Re Jones' Trusts*, 2 Bea. 242; *Maddock* v. *Legg*, 25 Bea. 531; *Hobgen* v. *Neale*, L. R. 11 Eq. 48; *Re Corlass*, 1 Ch. D. 460; *Edyvean* v. *Archer*, [1903] A. C. 379. "Offspring" is synonymous with "issue," see *Thompson* v. *Beasley*, 3 Drew. 7; *Re Smith*, 35 Ch. D. 558; *Bradshaw* v. *Bradshaw*, [1908] 1 Ir. R. 288 (read as a word of limitation in a gift to "A and her offspring"); *Young* v. *Davies*, 2 Dr. & Sm. 167 (confined to children in an executory trust to settle); *Lister* v. *Tidd*, 29 Bea. 618. In a bequest to the issue male of A, it was held that the claim must be wholly through males: *Lywood* v. *Kimber*, 29 Bea. 38, *vide ante*, p. 1534. See also *Re Taylor's Trusts*, [1912] 1 Ir. R. 1 (gift void for perpetuity).

(*q*) 3 Ves. 257.

(*r*) In *Weldon* v. *Hoyland*, 4 D. F. & J. 564, and *Law* v. *Thorp*, 27 L. J. Ch. 649, where there were words of severance, the issue took as tenants in common. As to the severance of a joint tenancy where the share of a deceased joint tenant is given to his issue, see *Heasman* v. *Pearse*, L. R. 7 Ch. 275, and other cases cited *post*, p. 1767.

(*s*) 13 Ves. 340. See also *Freeman* v. *Parsley*, 3 Ves. 421.

(*t*) "The legal and proper import" of issue is descendants: *per* Knight Bruce, V.-C., in *Head* v. *Randall*, 2 Y. & C. C. C., at p. 235; see *Edyvean* v. *Archer*, [1903] A. C., p. 384. As to the case of *Norman* v. *Norman*, Beat. 430, which does not relate to the law of wills, see Farwell on Powers (3rd ed.), 559.

(*u*) Chap. XXXVI, pp. 1287 *seq.*

(*w*) Chap LI.

(*x*) Chap. XXXIII.

(*y*) Chap. XXXIII.

(*z*) First ed., Vol. II, p. 34.

estate, or (which is identical for this purpose) the produce of realty. Probably, however, the construction of the word 'issue' would not be varied when applied to real estate. It is true, indeed, that the word 'issue,' when preceded by an estate for life in the ancestor, is frequently construed (as we shall hereafter see) as synonymous with heirs of the body, and as such conferring an estate tail (*a*), on the ground that this is the only mode in which the testator's bounty can be made to reach the whole class of descendants born and unborn; and it must be confessed, that the same reasoning applies, to a certain extent, in the case now under consideration; for, to adopt any other interpretation narrows the range of objects, by confining the devise to issue living at a given period, and thereby excluding, it may be, an unlimited succession of unborn descendants, on whom an estate tail would, if not barred, devolve (as in *Mandeville's Case* (*b*)). But whatever may be the plausibility or force of such analogical reasoning, it has received but little countenance from the cases; there being, it is believed, no direct adjudication in favour of such a construction, while positive authority may be cited against it: as, in the case of *Cook* v. *Cook* (*c*), where it was held, that, under a devise to the issue of J. S., the children and grandchildren took concurrently an estate for life.

"To the issue of J. S."

Remark on *Cook* v. *Cook*.

"Seeing that the construction which obtained in this case has the merit of letting in all the existing issue concurrently, instead of vesting the property in the eldest or only son (as would generally be the effect of the alternative construction above suggested), it seems probable that it will be hereafter followed in a similar case; and there appears to be an increased motive for its adoption, now that, under such a devise (if contained in a will made or republished since the year 1837), the issue would take the fee.

Effect where the devise is to the issue as tenants in common in fee.

"At all events, if the devise to the issue not only confers an estate in fee, but also contains words of distribution (which are obviously inconsistent with holding the word 'issue' to be synonymous with heirs of the body), it is clear that issue of every degree are entitled as tenants in common" (*d*).

Effect of express desire to keep estate together.

It is equally clear, on the other hand, that if the context manifests an intention to keep the devised estates together in a single owner, the issue will take successively in tail, as in *Mandeville's Case*. Thus, where by will, dated 1780, a testator

(*a*) This construction is not possible in a will coming into operation after 1925.

(*b*) *Ante*, p. 1527.

(*c*) 2 Vern. 545.

(*d*) *Mogg* v. *Mogg*, 1 Mer. 654.

devised his "estates" in formally strict settlement to several of his sons and daughters in tail male, "and in default of such issue to all and every other the issue of my body, and for default of such issue to my own right heirs," his desire being "to prevent the dispersion of his estates, and to keep up his name and family in one person;" the devise to issue was read as a devise to the heirs of the body (*e*).

Distribution *per capita* or *per stirpes*.

To return to gifts of personal estate. It has been already mentioned (*f*) that under a gift to issue, descendants of every degree are, as a general rule, entitled *per capita* as tenants in common or as joint tenants, according as there are or are not words of severance, children taking concurrently with their parent (*g*). And a gift to the issue of two or more persons follows the same rule (*h*). But, as in the case of gifts to descendants, so in a gift to issue, the testator may expressly or impliedly direct a division *per stirpes* (*i*), in which case children are not allowed to take concurrently with their parent. The manner in which the stocks are to be ascertained has also been discussed (*k*).

Gifts to persons of different generations.

In the case of a gift to the issue of a person *per stirpes*, the general principle is that children never take concurrently with their parent (*l*). And in other cases, where a division *per stirpes* is not directed, "it is certainly not very probable, *a priori*, that a testator should intend that parents and children and grandchildren should take together as tenants in common *per capita*; and the Court will not very willingly adopt such a construction. But if such an intention is clearly expressed, and there is nothing in the will to control it, and to show that such was not his intention, that construction must of course prevail" (*m*). Thus, in *Law* v. *Thorp* (*n*), a testator gave property to his daughter for life and after her decease to her children and their issue, and it was held that all the children and their issue were entitled *per capita*. But a contrary intention may appear. Thus, in *Davis* v. *Bennett* (*o*), a testator gave his residue to be equally

(*e*) *Allgood* v. *Blake*, L. R. 7 Ex. 339; 8 Ex. 160. See also *Whitelock* v. *Heddon*, 1 B. & P. 243.

(*f*) *Ante*, p. 1561.

(*g*) *Freeman* v. *Parsley*, 3 Ves. 421; *Cancellor* v. *Cancellor*, 2 Dr. & S. 194.

(*h*) *Surridge* v. *Clarkson*, 14 W. R. 979 (gift to M. for life, with remainder to her two surviving sisters' issue). Compare the cases on gifts to the children of two or more persons, *post*, pp. 1687 *seq.*

(*i*) *Ante*, p. 1560, *Dick* v. *Lacy*, 8 Bea. 214; *Re Orton's Trust*, L. R. 3 Eq. 375; *Gibson* v. *Fisher*, L. R. 5 Eq. 51; *Re Rawlinson*, [1909] 2 Ch. 36. See *Stonor* v. *Curwen*, 5 Sim. 264 (executory trust).

(*k*) *Ante*, p. 1561. *Re Wilson*. 24 Ch. D. 664.

(*l*) See *Re Rawlinson*, [1909] 2 Ch. 36.

(*m*) *Per* Kindersley, V.-C., in *Cancellor* v. *Cancellor*, 2 Dr. & S., at p. 198.

(*n*) 27 L. J. Ch. 649.

(*o*) 4 D. F. & J. 327.

Davis v. *Bennett.*

divided between his sisters J. and M. and the issue of his deceased sisters E. and A., in equal shares if more than one of such respective issue. E. left living at the testator's death five children, twenty-four grandchildren, and twelve great grandchildren: A. left one child. Lord Westbury remarked that if the bequest had ended with the words, "if more than one," J. and M. and the descendants of E. and A. would have taken *per capita*, but the words "respective lawful issue" implied a primary division *per stirpes*: consequently J. and M. and the child of A. took each one-fourth, and the descendants of E. took the remaining fourth *per capita*.

Substitutional gifts.

Again where the gift to the issue is substitutional, or quasi-substitutional (*p*), the division is, as a general rule, *per stirpes*. Accordingly, if property is given to a number of persons with a gift by way of substitution to the issue of any of them dying in the lifetime of the testator, or before the period of distribution, or if property is given to a number of persons living at a certain time, and the issue of such of them as are then dead, the primary division is *per stirpes* (*q*), the issue of each of the deceased persons taking *per capita* between themselves (*r*).

Gift of "share."

If reference is made to the "shares" of the original legatees, this does not make the issue of a deceased legatee take *per stirpes* as between themselves. Thus where property is given to A for life, and after his death to B and C, and the testator directs that if either of them should be then dead, his share is to go to his issue, and B and C both die before A leaving issue, B's issue take one half and C's issue the other half, the issue of each taking *per capita* as between themselves (*s*).

Issue to take "parents'" share.

Where the gift to the issue directs that they shall take their parents' share (or their respective parents' shares), the question

(*p*) As to substitutional and quasi-substitutional gifts, see Chap. XXXVI.

(*q*) Where the distribution among persons of different generations is *per stirpes*, the general rule is that children never take concurrently with their parents (*ante*, p. 1560). See *Re Lund's Settlement*, 89 L. T. 606 (limitation by deed to the children "or remoter issue" of A), following *Re Cleland's Trusts*, 7 L. R. Ir. 74.

(*r*) *Armstrong* v. *Stockham*, 7 Jur. 230; *Gowling* v. *Thompson*, L. R. 11 Eq. 366 n.; *Re Sibley's Trusts*, 5 Ch. D. 494. Compare *Barnaby* v. *Tassell*, L. R. 11 Eq. 363, where the gift was to children and grandchildren. In *Shailer* v. *Groves* (11 Jur. 485), where the gift was to A for life and after her decease to the testator's surviving brothers and sister or their issue, share and share alike, and all the brothers and sister died in A's lifetime, four of them leaving issue; it was held that the property was divisible into fourths, and that the division among the issue of each brother or sister was also to be *per stirpes*. *Sed quære.* The case is remarkable for the discrepancies between the various reports. The report in 6 Hare, 162, is obviously inaccurate in giving the words of the will (*post*, p. 2066).

(*s*) *Weldon* v. *Hoyland*, 6 L. T. 96; *Southam* v. *Blake*, 2 W. R. 446. The decision of Romilly, M.R., in *Robinson* v. *Sykes*, 23 Bea. 40, is *contra*; that was a case of settlement by deed.

Ross v. *Ross.*

is more difficult. In *Ross* v. *Ross* (*t*), where there was a gift to A for life, with remainder to the children of A living at her death and the issue of such of her children as might have died in her lifetime, the issue to take the share which their parent would have been entitled to if living, it was held by Romilly, M.R., that "parent" was not confined to a child of A, but might mean a grandchild who died leaving issue, the result being that the division was *per stirpes* throughout. A had five children, of whom two predeceased her, one leaving children, and the other leaving no issue except a grandchild: consequently the grandchild took one-fifth. The same principle was followed by Malins, V.-C., in *Re Orton's Trust* (*u*).

Birdsall v. *York.*

But in a case before Sir J. Stuart (*x*), where property was given to A for life and then to B, C, D and E equally, and the issue of any of them who should be then dead, the issue to take the share which their parent would have been entitled to if living, the V.-C. seems to have read "parent" as meaning "ancestor" namely that person who would have taken a share if he had been living; B died in A's lifetime leaving three children, X, Y, and Z, who also died in A's lifetime, X leaving four children, Y one child, and Z six: the V.-C. therefore held that these eleven grandchildren of B took his one-fourth share *per capita* as between themselves. So far as the decision admitted the grandchildren to share in the fund, the decision no doubt carried out the intention of the testator, but technically it seems contrary to the so-called rule in *Sibley* v. *Perry*, and even assuming that that rule was not applicable in *Birdsall* v. *York* (*y*), there still remains the difficulty that according to the principle laid down in *Ross* v. *Ross* (*z*) and *Ralph* v. *Carrick* (*a*), where there is a gift to "issue" and it appears from the whole will that "issue" is to be construed in its proper sense, then the effect of a direction that "issue" are to take their parents' share, is

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(*t*) 20 Bea. 645. The exact words of the will are given *post*, p. 1570. The construction appears to have been assisted by the reference to "a child's share": *Re Embury*, 109 L. T. 511.

(*u*) L. R. 3 Eq. 375. Compare *Palmer* v. *Crutwell*, 8 Jur. (N.S.) 479, where the will was elaborately worded, and correspondingly obscure.

(*x*) *Birdsall* v. *York*, 5 Jur. (N.S.) 1237. In *Minchell* v. *Lee*, 17 Jur. 727, before the same Judge, where the gift was in trust for A for life, and after his death for all the children of A living at his death, except B, and for the issue of any children of A who should be then dead, and for the issue of B, "such issue taking their respective parents' share," it was held that the primary division was *per stirpes*, as though a share had been given to B and his issue were taking by substitution; it does not appear whether any of the children left issue remoter than children.

(*y*) As to this see *post*, p. 1569.

(*z*) 20 Bea. 645, *post*, p. 1570.

(*a*) 11 Ch. D. 873, *post*, p. 1570.

that the distribution is *per stirpes* throughout (*b*). It is therefore submitted that in *Birdsall* v. *York* the grandchildren of B should have taken *per stirpes* as between themselves, assuming, as already mentioned, that "issue" was properly construed as meaning "descendants" and not "children."

When issue ascertained.

The general rule when the class of issue is to be ascertained seems to be similar to that hereinafter stated with regard to gifts to children (*c*). Thus under an immediate gift to the issue of A, the class is ascertained at the testator's death, while if the gift is subject to a prior life interest, the class is not closed until the death of the tenant for life, so that it includes all who are born between the death of the testator and that of the tenant for life (*d*). Where the class take as joint tenants the result often is that the issue living at the death of the tenant for life take the whole by survivorship (*e*).

Substitutional gift.

Where the gift to the issue is substitutional a somewhat different rule prevails (*f*).

Accruing shares.

In *Re Ridge's Trusts* (*g*), the testator bequeathed residue in trust for his daughters, A, B and C, and any other daughters he might afterwards have equally for life, and if all, any, or either of them should die leaving issue, then to pay an equal part equally amongst the issue of each daughter that should die leaving issue, and if only one daughter should die leaving issue then to pay the whole among the issue of such one daughter, but if all such daughters should die without leaving issue then over. The testator left A, B and C his only daughters. A died leaving issue; then B died unmarried. The Court having supplied cross limitations between the stocks, which of course carried over accruing as well as original shares, held that the class of issue to take the accrued share must be ascertained at the same time as the class to take the original share, *viz.*, the death of their own ancestor; otherwise a cardinal rule of construction would be contravened, *viz.*, the rule that interests are to be vested as soon as they can be consistently with what the testator has said (*h*);

(*b*) See *Shand* v. *Kidd*, 19 Bea. 310, where the gift was to the issue of six tenants for life and the issue of any deceased issue, "such class of issue, whether in the first or second degree," to take only the share which their deceased parent or parents would have been entitled to if living; held to require a distribution *per stirpes* as between children and grandchildren.

(*c*) *Post*, pp. 1638 *seq.*

(*d*) *Surridge* v. *Clarkson*, 14 W. R. 979. The reason of the rule is explained by Kindersley, V.-C., in *Lee* v. *Lee*, 1 Dr. & Sm., at p. 87.

(*e*) See *Re Jones's Estate*, 47 L. J. Ch. 775.

(*f*) See *ante*, p. 1285.

(*g*) L. R. 7 Ch. 665.

(*h*) But the accruing share cannot be vested, though it may be transmissible before the contingency happens upon which the accruer takes place.

and moreover the gift of the whole to the issue of one tenant for life if only one left issue, would be contradicted. "Under this gift," said Sir W. James, L.J., "if one dies leaving issue and the others die afterwards without issue, the issue of the first take the whole; but if they are ascertained at the death of the survivor, it must be held that the interests which the class of issue ascertained at the first daughter's death take in her share are liable to be divested so as to let in other issue, a construction which the Court would not readily be induced to adopt." It is submitted, however, that the decision rests more securely on the consolidation of the shares; for whatever construction is adopted with regard to the vesting of additional shares, it by no means of necessity governs the construction with regard to the divesting of that which is already vested.

"Issue" explained to mean *children.*

(ii) "*Issue,*" *when construed* "*Children.*"—The word "issue," however, may be, and frequently is, explained by the context to bear the restricted sense of "children" (*i*).

Reference to "father" or "mother,"

Where a will declares that in the event of the deaths of original devisees or legatees before a specified time, their issue shall take the shares which the *father* or *mother* of such issue would have taken if then living, it is obvious that issue must be construed to mean children (*k*).

or to "parent."

And a clause substituting issue for their parents, it seems, has the same effect, the word "parents" so used being considered to denote the original legatees, and not the parents of their issue remoter than children.

Sibley v. *Perry.*

Thus, in *Sibley* v. *Perry* (*l*), where a testator gave a sum of £1,000 to each of several persons, if living at his decease, and if not, he directed that their lawful issue should take that £1,000 stock which their respective parents, if living, would have taken; and he made other bequests to the lawful issue, living

(*i*) "In the ordinary parlance of laymen ['issue'] means children, and only children": *per* James, L.J., in *Ralph* v. *Carrick*, 11 Ch. D., at p. 883. *Sed quære.* If a man died leaving grandchildren, but no children, would any layman say that he died without issue? It seems that in Ireland in a settlement of personalty by deed or will on a person and his issue, the word "issue" *prima facie* means "children": *Harris* v. *Loftus*, [1899] 1 Ir. R. 491. There is no such rule in England; *Re Warren's Trusts*, 26 Ch. D. 208. "Offspring" is sometimes construed to mean "children": *Tabuteau* v. *Nixon*, 15 T. L. R. 485.

(*k*) *Buckle* v. *Fawcett*, 4 Hare, 536, 544; *Martin* v. *Holgate*, L. R. 1 H. L. 175.

(*l*) 7 Ves. 522: *Pruen* v. *Osborne*, 11 Sim. 132; *Bradshaw* v. *Melling*, 19 Bea. 417 (real estate); *Smith* v. *Horsfall*, 25 Bea. 628; *Maynard* v. *Wright*, 26 Bea. 285 (real estate); *Rhodes* v. *Rhodes*, 27 Bea. 413; *Stevenson* v. *Abingdon*, 31 Bea. 305; *Lanphier* v. *Buck*, 2 Dr. & Sm. 484; *Heasman* v. *Pearse*, L. R. 7 Ch. 275; *Re Smith*, 58 L. J. Ch. 661; *Re Birks*, [1900] 1 Ch. 417. In *Crozier* v. *Crozier*, 3 Dr. & War. 373, where a testator devised lands to the "issue male and female of J. C., now begotten or to be begotten on the body of his present wife," issue was held to mean children.

at certain periods, of other persons; Lord Eldon thought it was clear, as to the former class, that children were intended, and that this was a ground for giving to the word "issue" the same construction in the other bequests (*m*).

Remarks on *Sibley* v. *Perry*.

It is a mistake to suppose that Lord Eldon laid down any general rule of construction in *Sibley* v. *Perry*: his decision expressly went upon the whole will taken together (*n*). With reference to the rule James, L.J., observes: "It is, however, I think settled, but rather by the case of *Pruen* v. *Osborne* (*o*), than by *Sibley* v. *Perry*, that as a general rule, when you find a gift to a person and then a gift to the issue of that person, such issue to take only the parent's share, the word issue is cut down to mean children. I am not sure that some of the consequences of such a rule have always received the attention they ought to have received. Suppose a man to leave his property to his wife for life, and at her death to all his children then living and the issue of such of them as should be then dead, equally to be divided between them, the issue of any of them who might be then dead to take only their parent's share. Suppose then his children all to die before the period of division, having had children who predeceased them, leaving families, the grandchildren might go to the workhouse, and the family property go to a stranger under the residuary gift. That seems a possible result of that rule" (*p*).

A case similar to that suggested by the L.J. occurred in *Birdsall* v. *York* (*q*), where the result of applying the so-called rule in *Sibley* v. *Perry* would have been to produce an intestacy as to one-fourth of the residue, and Stuart, V.-C., for reasons not stated in the report, held that "issue" included grandchildren.

(*m*) See also *Ridgeway* v. *Munkittrick*, 1 Dr. & War. 84, and the other cases cited, p. 1575. It is not, however, a necessary result of the word "issue" being used in the sense of *children* in one clause, that it is to be similarly construed in another clause, where it is surrounded by a different context: *Carter* v. *Bentall*, 2 Bea. 551, and other cases cited *post*, p. 1576.

(*n*) *Per* Cotton, L.J., in *Ralph* v. *Carrick*, 11 Ch. D., at p. 886. "And there is a manifest distinction between the case where, as in *Sibley* v. *Perry*, the only gift to the issue is contained in the direction that they shall take the shares which their respective parents would have taken if living, and the more usual case where there is a distinct gift to the issue, followed by a direction that the issue shall take only a parent's share. In the latter case the direction as to the share *may* be construed distributively; *e.g.* that a grandchild shall take a child's share, and a great-grandchild take a grandchild's share." Hawkins on Wills, 3rd ed., p. 115. In *Re Johnson*, 111 L. T. 130, Joyce, J., held that the words "so that children shall in all cases take their parents' share" did not bring into operation the rule in *Sibley* v. *Perry*.

(*o*) 11 Sim. 132.

(*p*) *Per* James, L.J., in *Ralph* v. *Carrick*, 11 Ch. D., at p. 882. As to the argument based on a possible intestacy, see *Re Campbell's Trust*, 33 Ch. D. 98.

(*q*) 5 Jur. (N.S.) 1237, stated *ante*, p. 1566.

Another example of the way in which the so-called rule in *Sibley* v. *Perry* operates to defeat the obvious intention of the testator is of constant occurrence. In such a case as that suggested by James, L.J., if one of the testator's sons were to die before the period of division, leaving grandchildren, but no child, the other children of the testator and the children of such of them as were dead would take, to the exclusion of the grandchildren of the deceased son.

Effect of gift over on failure of issue.

Ross v. *Ross*.

Whether the so-called rule in *Sibley* v. *Perry* is a rule of general application or not, it is clear that it does not apply in cases where there is a gift over on a general failure of issue of the original legatee (*r*). Thus, in *Ross* v. *Ross* (*s*), a testator bequeathed a share of a fund to his niece C. for life, and after her death to her children living at her death, and the issue then living of children then dead, each surviving child to take an equal share, "and the issue, if more than one," of deceased children "to take equally amongst them the share which their parent would have been entitled to if he or she had survived C., and if but one, then to take a child's share"; the other parts of the fund were then given in similar terms to other nieces and their respective children and issue; "and in case all my said nieces should die without leaving a child or issue of a child living at their respective deaths, then" to sink into the residue: Romilly, M.R., held that "issue" retained its primary meaning in the original gift. As between a parent and his issue, "issue" meant "children"; but "parent" meant "child" or "grandchild" according to circumstances; so that on the death of a parent of any degree, his children (whether children, grandchildren, or remoter issue of C.) took his share, but not letting in issue of a remoter degree to share with issue less remote (*t*). In other words, the substitution would take place according to circumstances through all the degrees of issue.

Ralph v. *Carrick*.

This decision was approved by the Court of Appeal in *Ralph* v. *Carrick* (*u*), where a testator bequeathed a portion of his residuary personal estate, after the death of his wife, to the children of his late aunt W. equally, the descendants, if any, of those who might have died being entitled to the benefit which

(*r*) *Re Swain*, [1918] 1 Ch. 399; the case was compromised on appeal, *ib.* 574.

(*s*) 20 Bea. 645; *Re Kavanagh's Will*, 13 Ir. Ch. 120; *Re Embury*, 109 L. T. 511.

(*t*) That, where "issue" is unrestricted, issue of several degrees taking by substitution will not take concurrently, see also *Robinson* v. *Sykes*, 23 Bea. 40; *Amson* v. *Harris*, 19 Bea. 210; *Re Orton's Trust*, L. R. 3 Eq. 375; *Gibson* v. *Fisher*, L. R. 5 Eq. 51; *Re Rawlinson*, [1909] 2 Ch. 36. But see *Birdsall* v. *York*, 5 Jur. (N.S.) 1237, commented on *ante*, p. 1566.

(*u*) 5 Ch. D. 984, 11 Ch. D. 873. The difference between "issue" and "descendants" has been already referred to, *ante*, p. 1561.

their deceased parent would have received if alive; and gave the other portions to other aunts and their descendants in like manner; "and should there be no children or lawful descendants of any of my said aunts at the time these bequests should become payable, then the portion destined for such to be placed in the general residuary fund and bestowed as part thereof as above pointed out" (*x*): the C. A. held that the gift to "descendants" was not confined to children; they thought that "descendants" could not be so easily controlled by the context as "issue," but if the word used had been "issue," James, L.J., thought it would have been impossible to distinguish the case from *Ross* v. *Ross*. He said (*y*): "Here we have a gift over of all the funds provided for the aunts and their descendants, which gift over is not to take effect except on failure of all the descendants of the aunts; and this appears to me to exclude the limited construction which it is sought to give to the original gift. That was decided in *Ross* v. *Ross*, and it seems to me rightly decided" (*z*).

Possible construction of direction as to parents' shares.

The decisions in *Ross* v. *Ross* and *Ralph* v. *Carrick* seem to suggest that in lieu of the rule supposed to be laid down in *Sibley* v. *Perry*, a more convenient principle of construction might be adopted, namely, that where a testator in a gift to the issue of a person directs that they shall take their parents' share, whether there is a gift over or not, he merely means that the division is to be *per stirpes* throughout. On this principle, in cases where there is a distinct gift to the issue in the first instance, as Mr. Hawkins points out (*a*), the direction that issue shall take their parents' shares would be construed distributively, *e.g.*, that a grandchild shall take a child's share, and a great-grandchild take a grandchild's share. Such a construction is more natural and convenient than that which makes "issue" mean children, for while it avoids the inconvenient result of making remote descendants take concurrently with their living ancestors, it avoids the danger of a possible intestacy in cases such as those suggested by James, L.J., and exemplified by *Birdsall* v. *York* (*b*), and also allows remote

(*x*) This appears to be an effectual disposition of any portion of which the primary trusts failed, see *Atkinson* v. *Jones*, Joh. 246; and cf. *Lightfoot* v. *Burstall*, 1 H. & M. 546.

(*y*) 11 Ch. D., at p. 884.

(*z*) The decision in *Berry* v. *Fisher*, [1903] 1 Ir. R. 484, may possibly be supported on the same ground; *sed quære*, for in that case the primary gift was clearly confined to children by the reference to their mother's interest, and the fact that the testator in other parts of the will used "issue" in its proper sense ought not to have influenced the construction.

(*a*) Wills, 3rd ed., 115, *ante*, p. 1569, n. (*n*).

(*b*) *Ante*, p. 1569. In *Re Birks*, [1900] 1 Ch. 417, below, the construction of "issue" as meaning children probably defeated the intention of the testator.

issue to take in place of their deceased parent, which may be assumed to have been the intention of the testator (*c*). However, recent decisions show no disposition on the part of the Courts to adopt any such general principle (*d*).

Re Timson.

In *Re Timson* (*e*), the testatrix gave her residuary estate, subject to a life interest, to five named nephews and nieces, and directed that, if any of them should die in the lifetime of the tenant for life leaving issue, such issue should take the share which his or her or their deceased parent would have taken if living; but if any of them should die in the lifetime of the tenant for life without leaving issue him or her surviving, the share of the one so dying should be divided amongst the survivors or survivor and the issue of him or her or them so dying and leaving issue. Younger, J., applied *Sibley* v. *Perry* and held that the word "issue" in each branch of the clause must be confined to children. This decision was affirmed in the Court of Appeal (*f*). The cases were again considered by Sargant, J., in *Re Burnham* (*g*), who held, on the ground that in a previous part of the will a careful distinction had been drawn between children and issue, that in the phrase "so that the issue shall participate only as representing their deceased parent" the word "issue" included grandchildren as well as children.

Re Burnham.

"Issue" used to mean "children."

Another instance of a gift to "issue" being restricted by the context to children is to be found in *Re Birks* (*h*). There a testator, after giving a legacy, provided that in the event of the legatee pre-deceasing him, his issue should be entitled to the legacy, in equal shares if more than one, "and if only one, the whole to such one child": this was held to mean that the testator used "issue" in the sense of "children."

"Issue of issue."

Where the gift is to issue, and the testator proceeds to speak of "issue" of that issue, it is clear that he did not, in the first instance, use the word "issue" in its most comprehensive sense; and if he has further called the first "parents" of the second, the sense to which the word is limited must be that of "children" (*i*). Even without the latter circumstance it is difficult to see how, if restricted at all, the term can mean

(*c*) *Ante*, p. 1569.
(*d*) See *Re Birks*, [1900] 1 Ch. 417, *post*, p. 1576, n. (*h*).
(*e*) [1916] 1 Ch. 293.
(*f*) [1916] 2 Ch. 362.
(*g*) [1918] 2 Ch. 196.
(*h*) [1900] 1 Ch. 417. In *Roddy* v. *Fitzgerald*, 6 H. L. C. 823, there was a limitation to the issue of a person equally if more than one, "and if only one child to said child"; Lord Cranworth said that this did not give a restricted meaning to "issue."
(*i*) *Pope* v. *Pope*, 14 Bea. 591.

anything but children, unless it means issue living at a particular period. Thus, in *Livesay* v. *Walpole* (*k*), a gift over in the event of the testator's daughter dying without leaving "issue or issue of her issue" was held to show that the testator throughout the will used issue in the sense of children. In *Williams* v. *Teale* (*l*), there was an executory trust to settle real and leasehold estates upon the testator's children for their lives and their issue for their respective lives, with elaborate clauses of survivorship and gifts over, some of them to take effect in the event of the issue of the children dying without leaving issue: it was held that in the gift to the issue of the testator's children, and in some other parts of the will, "issue" meant "children," although in other parts of the will it might be necessary to read the word "issue" in a different sense. And in *Fairfield* v. *Bushell* (*m*), where there was a gift at the death of A to her lawful issue and the children of such of them as should be then dead, the children of such deceased issue to take their deceased parent's share, it was held that the "issue" of A meant her children.

"Issue of children."

"Children of issue."

Where there was a gift to "the legal issue by marriage" of A, to be divided among them equally at twenty-one, this was held to mean children (*n*).

In *Hampson* v. *Brandwood* (*o*), it was considered that a limitation in a deed to the first male issue, lawfully begotten by A, was restricted to *sons*; but the construction seems to have been aided by the context, the next limitation being expressly to daughters, and the father having a power, in case there were any such male issue to inherit, to charge the property in favour of his "other children." It has been frequently decided, that the words "lawfully begotten by A" are not *per se* enough to limit a bequest "to the issue of A" to his children (*p*). But in a case upon articles for a settlement on husband and wife successively for life, with remainder to their issue as they should appoint, and in default of appointment, then in equal shares, if there were more than one of such issue, born in the husband's lifetime or *in a reasonable time after his death*, it was held by Sir E. Sugden that the word "issue" meant *children* (*q*).

"Issue begotten by A."

(*k*) 23 W. R. 825.

(*l*) 6 Hare, 239. *M'Gregor* v. *M'Gregor*, 1 D. F. & J. 63; *Cursham* v. *Newland*, 2 Scott, 105, 4 M. & W. 101.

(*m*) 32 Bea. 158. As to the meaning of the words "then living" or "then dead," see *post*, p. 1467 *seq.*

(*n*) *Reed* v. *Braithwaite*, L. R. 11 Eq. 514.

(*o*) 1 Madd. 381; *Gordon* v. *Hope*, 3 De G. & S. 351.

(*p*) *Caulfield* v. *Maguire*, 2 Jo. & Lat., at p. 176; *Evans* v. *Jones*, 2 Coll. 516; *Haydon* v. *Wilshere*, 3 T. R. 372. And see *King* v. *Melling*, 1 Vent. 225.

(*q*) *Thompson* v. *Simpson*, 1 D. & War. pp. 459, 480.

CHAPTER XLI.

Gift to issue referred to as gift to children.

A gift to issue may also be restricted to children by a codicil (*r*), or another clause of the will (*s*), referring to it as a gift to "children," or by declaring the trusts by reference to trusts for children (*t*).

Effect where words "issue" and "children" are used indifferently.

"Difficulty, however," as Mr. Jarman points out (*u*), "often arises from the testator having used the words *issue* and *children* synonymously, rendering it necessary therefore, in order to avoid the failure of the gift for uncertainty, that the prevalency of one of these respective terms should be established. Lord Hardwicke thought, that, where the gift was to several, or the respective *issues* of their bodies, in case any of them should be dead at the time of distribution—*viz.*, to each, or their respective *children* one-fourth, followed by a gift to survivors, in case any of them should be dead without issue, the word 'children' was not restrictive of 'issue' previously mentioned, the *videlicet* being merely explanatory of the shares to be taken, and not of the objects to take. The word 'children,' therefore, was to be construed as meaning *issue*, and not 'issue' abridged to *children*" (*x*).

Where "children" prevails.

On the other hand, the word "children" will control the word "issue," if that construction appears to be consistent with the testator's intention. Thus in *Goldie* v. *Greaves* (*y*), a testatrix bequeathed her personal estate to her sisters, or in case of the death of either or any of them leaving issue, then the share of her so dying to go to such child or children equally: it was held that "issue" meant child or children. So, in *Farrant* v. *Nichols* (*z*), where the gift was to the "respective issues," "whether sons or daughters," of certain persons.

Effect given to each word.

There is, of course, nothing to prevent a testator from using "issue" and "children" in their proper meanings in different parts of his will. As in *Waldron* v. *Boulter* (*a*), where a testator

(*r*) *M'Gregor* v. *M'Gregor*, 1 D. F. & J. 63.

(*s*) *Baker* v. *Bayldon*, 31 Bea. 209.

(*t*) *Marshall* v. *Baker*, *ib.* 608 (deed).

(*u*) First ed., Vol. II, p. 37.

(*x*) *Wyth* v. *Blackman*, 1 Ves. sen. 196; Amb. 555 (deed), 3 Ves. 258. See also *Horsepool* v. *Watson*, 3 Ves. 383; *Royle* v. *Hamilton*, 4 Ves. 437; *Dalzell* v. *Welch*, 2 Sim. 319; *Doe* d. *Simpson* v. *Simpson*, 5 Scott, 770, stated *post*; *Harley* v. *Mitford*, 21 Bea. 280. In *Cancellor* v. *Cancellor*, 2 Dr. & Sm. 194, the testator sometimes used both words together, "children and issue," sometimes "children" only, and all degrees were held entitled. See also *Jennings* v. *Newman*, 10 Sim. 219.

(*y*) 14 Sim. 348; *Benn* v. *Dixon*, 16 Sim. 21; *Carter* v. *Bentall*, 2 Bea. 551; *Earl of Orford* v. *Churchill*, 3 V. & B. 59; *Bryan* v. *Mansion*, 5 De G. & S. 737; *Edwards* v. *Edwards*, 12 Bea. 97; *Re Heath's Settlement*, 23 Bea. 193; *Bryden* v. *Willett*, L. R. 7 Eq. 472; *Re Hopkins' Trusts*, 9 Ch. D. 131; *Re Warren's Trusts*, 26 Ch. D. 208, and other cases, *post*, Chap. LI.

(*z*) 9 Bea. 327; *Baker* v. *Bayldon*, 31 Bea. 209; *See Re Dean*, 67 Sol. J. 768.

(*a*) 22 Bea. 284. Compare *Dalzell* v. *Welch*, 2 Sim. 319.

bequeathed certain leaseholds to his four grandchildren, and after their decease to their lawful issue, and he bequeathed other leaseholds to the same grandchildren, and after their death to their children.

"Issue" used in different senses in different parts of the same will.

It will be remembered that in *Sibley* v. *Perry* (*b*), Lord Eldon gave "issue" the meaning of children in one part of a will, because he thought that it was clearly used in that sense in another part. This principle of construction has been much discussed, especially with reference to the well-known dictum of Lord St. Leonards in the case of *Ridgeway* v. *Munkittrick* (*c*), which is as follows: "It is a well-settled rule of construction, and one to which from its soundness I shall always strictly adhere, never to put a different construction on the same word, where it occurs twice or oftener in the same instrument, unless there appear a clear intention to the contrary." Mr. Jarman remarks (*d*): "To this proposition no objection can be advanced: but it seems not entirely to dispose of the difficulties attending these cases, for the question still is, what amounts to such 'a clear intention to the contrary,' as will take any given case out of the rule. Different minds may (as the reports abundantly testify) estimate variously the force of context requisite to outweigh the presumption of similarity of intention from the recurrence of the same expression. Where a term is in some instances accompanied by an explanatory context, and in other instances not, a Judge may see in the occasional omission of the explanatory phrase sufficient ground to infer a difference of intention in the respective instances, of which the case of *Dalzell* v. *Welch* (*e*) affords an example. In such cases, the general plan of the will must be regarded; and if we find that the testator's dispositive scheme would be violated by not giving to any term a uniform construction throughout the will, the argument for its adoption is very strong. Where the dispositions of the will are of a nature not to afford any such light, the task of its expounder becomes very embarrassing."

The rule in *Ridgeway* v. *Munkittrick*.

Lord St. Leonards' dictum has also been commented on by the Privy Council (*f*): "That dictum, asserted perhaps too positively as a general rule of construction, does not help one much in construing such a will as this. What is a clear intention? That which is clear to one man is not always clear to another. A sounder, or at any rate a safer, rule is to be found in the observations of Knight Bruce, V.-C., on the meaning of

(*b*) *Ante*, p. 1569.
(*c*) 1 Dr. & W. 84.
(*d*) First ed., Vol. II, p. 356 n.
(*e*) 2 Sim. 319.
(*f*) *Edyvean* v. *Archer*, [1903] A. C. p. 384.

this very word 'issue.' 'Before I can restrain that word,' said the Vice-Chancellor in *Head* v. *Randall* (*g*), 'from its legal and proper import, I must be satisfied that the contents of the will demonstrate the testator to have intended to use it in a restricted sense.' "

Notwithstanding the criticisms which have been passed on it, Lord St. Leonards' dictum is in high favour, and has been frequently followed (*h*).

Effect of context.

Whatever the value of Lord St. Leonards' canon of construction may be, it clearly does not apply where the context furnishes a guide to the testator's meaning, for it frequently happens that a testator uses "issue" in one part of his will, as meaning "children," and in another part as meaning "issue" in the proper sense of the word (*i*). As in *Re Corrie's Will* (*k*), where a testator gave property to A and B and after their deaths "equally among their issue if there shall be any child or children to take the share of their deceased parent," with a gift over in case either of them died "without issue"; it was held by Romilly, M.R., that in the former place "issue" meant children and in the latter issue generally.

"Eldest issue male."

A gift to the "eldest issue male" of a person *prima facie* means his eldest son (*l*). But in *Re Finlay's Estate* (*m*) "lawful eldest male issue" was construed as *nomen collectivum*.

Illegitimate children.

A gift to the "issue" of a person may include his illegitimate children, if the context of the will allows that construction (*n*).

(*g*) 2 Y. & C. C. C., at p. 235.

(*h*) *Edwards* v. *Edwards*, 12 Bea. 97; *Rhodes* v. *Rhodes*, 27 Bea. 413; *Foster* v. *Wybrants*, Ir. R. 11 Eq. 40; *Re Harrison's Estate*, 3 L. R. Ir. 114; *Re Birks*, [1900] 1 Ch. 417. In the last case the will was a difficult one to construe, but it is submitted that the proposition laid down by Lindley, M.R., that we must not start with any predisposition to read the word issue as meaning descendants is incorrect. It will be noticed that Romer, L.J., in the same case uses words which show that he intended to dissociate himself from Lord Lindley's proposition, which is in direct conflict with many cases, including *Clifford* v. *Koe*, 5 A. C. 447, and *Pelham Clinton* v. *Newcastle*, [1903] A. C. 111. If the decision in *Re Birks* is correct, *Re Warren's Trusts*, 26 Ch. D. 208 (on which Kekewich, J., relied), is no longer law. In *Re Adams*, 94 L. T. 720, Romer, L.J., said: "The term 'issue' is equivalent, in the absence of any context, to 'heirs of the body.'"

(*i*) *Carter* v. *Bentall*, 2 Bea. 551. *Head* v. *Randall*, 2 Y. & C. C. C. 231; *Hedges* v. *Harpur*, 9 Bea. 479; *Caulfield* v. *Maguire*, 2 Jo. & Lat., at p. 176; *Williams* v. *Teale*, 6 Ha. 239; *Berry* v. *Fisher*, [1903] 1 Ir. R. 484; *Edyvean* v. *Archer*, [1903] A. C. 379. As to the application of Lord St. Leonards's canon to deeds, see *Re Warren's Trusts*, 26 Ch. D. 208. *Supra*, n. (*h*).

(*k*) 32 Bea. 426.

(*l*) *Lovelace* v. *Lovelace*, Cro. El. 40; *Sheridan* v. *O'Reilly*, [1900] 1 Ir. R. 386.

(*m*) [1913] 1 Ir. R. 143; *Lewis* v. *Puxley*, 16 L. J. Ex. 216; *Doe* v. *Permewen*, 11 A. & E. 431.

(*n*) *Re Walker*, [1897] 2 Ch. 238. *Re Smilter*, [1903] 1 Ch. 198. See Chap. XLIII.

IV.—Gifts to Next-of-Kin (*o*).—A devise of land or bequest of personal property to "next-of-kin" without more, enures for the benefit of the nearest blood-relations in equal degree of the *propositus*, such objects being determined without regard to the Statutes of Distribution; and they take as joint tenants in equal shares (*p*). This rule, however, more particularly as it affects the rights of persons who claim by representation under the express clause of the statute (*q*), entitling the children of the brothers and sisters of an intestate to stand in the place of their deceased parents, was the subject of many conflicting dicta and determinations. In favour of the claim of these representatives were the dictum of Lord Kenyon (*r*), and the decisions of Buller, J. (*s*), and Sir J. Leach (*t*). On the other side were ranged the strongly expressed opinions of Lord Thurlow (*u*), Lord Eldon (*v*), and Sir W. Grant (*w*), and a decision of Sir T. Plumer (*x*).

Gift to next-of-kin, how construed.

Such was the perplexing state of the authorities prior to *Elmsley* v. *Young*, which was as follows: A fund was settled by indenture, upon trust, after failure of certain previous trusts, for such persons as should, at the decease of A, be his *next-of-kin*. A died, leaving a brother, and the children of a deceased brother. Leach, M.R., held, that the children of the deceased brother were entitled to a moiety of the fund; his opinion being, that the words "next-of-kin" imported next-of-kin according to the Statutes of Distribution (*y*). The case was then brought, by appeal, before Lords Commissioners Shadwell and Bosanquet, who, after a full examination of the conflicting authorities, held, that the trust applied to the next-of-kin in the strictest sense of

Next-of-kin confined to persons strictly answering to this character.

(*o*) This Section deals only with gifts to next-of-kin where that expression, or the expression "nearest of kin" or "nearest of kindred" (*Markham* v. *Ivatt*, 20 Bea. 579) is used. As to the effect of a devise of land to "my next of blood," see *post*, p. 1602. A gift to "heirs," "family," "relations," etc., may operate as a gift to next-of-kin, as explained elsewhere in this chapter and *ante*, p. 1527. In *Scott* v. *Moore*, 14 Sim. 35 (stated *ante*, p. 1008), it was contended unsuccessfully that a direction that a particular fund should in certain events be considered as part of the testator's personal estate and be disposed of in a due course of administration, operated as a gift to the next-of-kin. As to powers of appointment in favour of next-of-kin, see *ante*, p. 794.

(*p*) *Withy* v. *Mangles*, 4 Bea. 358, 10 Cl. & Fin. 215; *Baker* v. *Gibson*, 12 Bea. 101; *Lucas* v. *Brandreth*, 28 Bea. 274 (deed); *Horn* v. *Coleman*, 1 Sm. & G. 169. See *Stockdale* v. *Nicholson*, L. R. 4 Eq. 359.

(*q*) 22 & 23 Car. 2, c. 10, explained by 29 Car. 2, c. 30. The Intestates' Estates Act, 1890, did not apply to cases of partial intestacy: *Re Twigg's Estate*, [1892] 1 Ch. 579.

(*r*) *Stamp* v. *Cooke*, 1 Cox, 234.

(*s*) *Phillips* v. *Garth*, 3 B. C. C. 64.

(*t*) *Hinckley* v. *Maclarens*, 1 My. & K. 27.

(*u*) *Phillips* v. *Garth*, 3 B. C. C. 64.

(*v*) *Garrick* v. *Lord Camden*, 14 Ves. 372.

(*w*) *Smith* v. *Campbell*, Coop. 275.

(*x*) *Brandon* v. *Brandon*, 3 Sw. 312.

(*y*) 2 My. & K. 82.

the term, excluding persons entitled by representation under the statute, and consequently, that A's surviving brother was entitled to the whole fund (*z*).

"Next-of-kin and nearest heir."

In *Re Maher* (*a*), there was a gift of real and personal property to the testator's next-of-kin and nearest heir, and it was held that the personal property went to the next-of-kin and the real estate to the heir-at-law.

Parents and children, being of kin in equal degree, take together as "next-of-kin."

So all who are of equal degree will be included in such a gift, though some of them may be beyond the statutory limit. Thus, in *Withy* v. *Mangles* (*b*), where the question was who was entitled under the ultimate limitation in a marriage settlement in favour of "such persons or person as shall be the next-of-kin of E. M. at the time of her decease"; E. M. died, leaving a child, and also her father and mother, who claimed each an equal share of the property with the child; Lord Langdale, M.R., decided that the parents, though postponed to children by the statutes, were here entitled concurrently with the child, as being of equal degree, and his decision was affirmed by the House of Lords (*c*).

The degrees are reckoned according to the civil law (*d*), so that kindred of the half-blood stand on equal ground with those of the whole blood (*e*).

Secus, where Statute of Distribution is referred to before 1926.

In wills coming into operation before 1926 (*f*) a reference to the statute, whether express (*g*) or implied from a mention of intestacy (*h*), will admit all kindred, and only those, who are within the statutory limit. Consequently, the children of deceased brothers and sisters will take concurrently with living brothers and sisters (*i*).

It will not, however, admit a husband or wife, who are not of kin to each other, nor, indeed, considered as such by the statute (*j*). It follows that where the same reason for exclusion

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(*z*) 2 My. & K. 780. See also *Avison* v. *Simpson*, Joh. 43; *Halton* v. *Foster*, L. R. 3 Ch. 505. A gift to "next-of-kin *in equal degree*" has been twice held to exclude representatives: *Wimbles* v. *Pitcher*, 12 Ves. 433; *Anon.* 1 Mad. 36.

(*a*) [1909] 1 Ir. R. 70, *ante*, p. 1527.

(*b*) 4 Bea. 358, 10 Cl. & Fin. 215.

(*c*) And see *Cooper* v. *Denison*, 13 Sim. 290 (brothers and sisters admitted with grandchildren).

(*d*) *Cooper* v. *Denison*, 13 Sim. 290.

(*e*) 2 Bl. Comm. 505; *Brown* v. *Wood*, Alleyn. 36; *Cotton* v. *Scarancke*, 1 Mad. 45; *Grieves* v. *Rawley*, 10 Hare, 63.

(*f*) For the new law see *post*, p. 1580.

(*g*) *Nichols* v. *Haviland*, 1 K. & J. 504. See also 4 Bea. p. 368. In *Harris* v. *Newton*, 46 L. J. Ch. 268, property was given to the testator's two daughters for life and "to descend to their legal or next-of-kin"; it was held that this did not import a distribution according to the statute.

(*h*) *Garrick* v. *Lord Camden*, 14 Ves. pp. 372, 385, 386.

(*i*) *Re Gray's Settlement*, [1896] 2 Ch. 802.

(*j*) *Garrick* v. *Lord Camden*, 14 Ves. 372; *Nichols* v. *Savage*, cit. 18 Ves. p. 53; *Watt* v. *Watt*, 3 Ves. 244, and other cases cited *post*, p. 1606; *Cholmondeley* v. *Lord Ashburton*, 6 Bea. 86; *Kilner* v. *Leech*, 10 Bea. 362; *Lee*

"Persons entitled under the statute."

does not exist, as in the case of a gift "to the person or persons who would under the statute have been entitled to the testator's personal estate in case he had not disposed of the same by will," the wife will take a share (*k*). But a husband did not take even under a gift of this nature (*l*).

Re Hudson.

In *Re Hudson* (*m*), a testator gave his real and personal estate upon trust for the person or persons who would have been entitled under the statute if the testator had died seised or possessed thereof intestate; it was held that the realty went to the heir-at-law and the personalty to the next-of-kin. In *Re Hughes* (*n*), Younger, J., said that the reason given for the decision in *Re Hudson* is not, as reported, satisfactory, but held in the case before him that the words "under the statute for the distribution of the estates of intestate persons" meant no more than the words "by law," so that the heir-at-law took the realty.

Woman dying "intestate and unmarried."

Where personal property is limited, in case of the death of a married woman in her husband's lifetime, to such persons as would have been entitled thereto in case she had died intestate and unmarried, the word "unmarried" is generally held to mean, "not having a husband at the time of her death" (*o*). To ascribe to the word its other meaning would plainly exclude the children of the marriage; and slight circumstances, such as an express provision made for the children in another part of the will, either out of the same (*p*), or a different (*q*) fund, have been held not to control the rule. In short, the object of the provision is considered to be merely to exclude the husband (*r*). And the mere circumstance that the woman is

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v. *Lee*, 29 L. J. Ch. 788; *Milne* v. *Gilbart*, 5 D. M. & G. 510. In *Re Collins's Trusts*, [1877] W. N. 87, the widow was upon the context held entitled to share, *sed qu.*; *Re Fitzgerald's Trusts*, 61 L. T. 221; *Re Parry*, [1888] W. N. 179.

(*k*) *Martin* v. *Glover*, 1 Coll. 269; *Jenkins* v. *Gower*, 2 Coll. 537; *Starr* v. *Newberry*, 23 Bea. 436. And if the will contains no express gift, but merely says that the property shall devolve according to the statute, the widow is entitled to share: *Ash* v. *Ash*, 33 Bea. 187, stated *ante*, p. 29, n. (*i*).

(*l*) *King* v. *Cleaveland*, 26 Bea. 166: 4 De G. & J. 477; *Milne* v. *Gilbart*, 2 D. M. & G. 715: 5 D. M. & G. 510; *Watt* v. *Watt*, 3 Ves. 244.

(*m*) 72 L. T. 892.

(*n*) [1918] 1 Ch. 493, 550. In *Maclean* v. *Smith*, [1927] N. Ir. R. 109, realty and personalty were settled together, and the statutory next-of-kin were held entitled to the realty as well as the personalty.

(*o*) *Day* v. *Barnard*, 1 Dr. & Sm. 351; *Maugham* v. *Vincent*, 9 L. J. Ch. 329 (settlement); *Hoare* v. *Barnes*, 3 Br. C. C. 316, ed. by Eden, n. (*a*); *Hardwick* v. *Thurston*, 4 Russ. 380; *Pratt* v. *Mathew*, 22 Bea. 328, 8 D. M. & G. 522 (settlement); *Re Gratton's Trusts*, 26 L. J. Ch. 648; *Re Saunders' Trust*, 3 K. & J. 152 (settlement). As to the *prima facie* meaning of "unmarried," see *ante*, p. 1251.

(*p*) *Coventry* v. *Earl of Lauderdale*, 10 Jur. 793; *Pratt* v. *Mathew*, *supra*; *Clarke* v. *Colls*, 9 H. L. C. 601, affirming *Mitchell* v. *Colls*, Johns. 674.

(*q*) *Re Norman's Trust*, 3 D. M. & G. 965 (settlement). In this case the words were "without being married."

(*r*) See *Hawkins* v. *Hawkins*, 7 Sim. 173 (and *Anonymous*, 1 Giff. 392),

unmarried at the date of the will does not supply a reason for putting a different construction on the word, since when it occurs with such a context it is clear that her marriage at some future time is contemplated (*s*).

Without having been married.

Where personal property is bequeathed, after the death of a married woman, to the persons who would have been entitled to it " if she had died intestate and without having been married " the general rule is that these words, being clear and unambiguous, are to be taken in their natural meaning, so as to exclude her issue as well as her husband, if any, and thus prevent him from becoming entitled to the shares of any children who die before acquiring a vested interest (*t*). The same rule applies to settlements by deed (*u*).

In *Re Collyer* (*x*), a widow gave her property upon trust for her daughter for life, with an ultimate trust for the persons who would have been entitled thereto as her (the testatrix's) statutory next-of-kin if she had died intestate and unmarried : it was held that " unmarried " meant " never having been married."

Statutes of Distribution.

The Intestates' Estates Act, 1890, is not included in the expression " Statutes of Distribution " (*y*).

Section 50 of the Administration of Estates Act, 1925, provides that trusts declared by a will coming into operation before 1926 by reference to the Statute of Distribution shall unless the contrary thereby appears be construed as referring to the enactments (other than the Intestates' Estates Act, 1900) relating to the distribution of estates of an intestate in force in 1925 (*z*).

New law.

But in a will coming into operation after 1925 references to any Statutes of Distribution are to be construed as referring to Part IV of the Administration of Estates Act, 1925, and reference to statutory next-of-kin, unless the context otherwise requires,

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where personal property belonging to a woman was settled on her marriage on her and her husband and their issue and in default of issue on the wife's statutory next-of-kin, as if she had died without having been married; there being no issue and no next-of-kin it was held that the fund resulted to the wife and that the husband was entitled to it as her administrator.

(*s*) *Day* v. *Barnard*, 1 Dr. & Sm. 351.

(*t*) *Re Watson's Trusts*, 55 L. T. 316.

(*u*) *Re Smith's Settlement*, [1903] 1 Ch. 373; *Re Brydone's Settlement*, [1903] 2 Ch. 84, approving *Emmins* v. *Bradford*, 13 Ch. D. 493; *Re Ellis*, [1921] 1 Ch. 230. The cases *contra*, *Re Ball's Trust*, 11 Ch. D. 270; *Upton* v. *Brown*, 12 Ch. D. 872; *Re Arden's Settlement*, [1890] W. N. 204; *Stoddart* v. *Saville*, [1894] 1 Ch. 480; *Re Forbes*, [1899] W. N. 6, and *Re Mare*, [1902] 2 Ch. 112, seem to have been based on a mistaken view of the decision in *Wilson* v. *Atkinson*, 4 D. J. & S. 455. The Irish cases of *Hardman* v. *Maffett*, 13 L. R. Ir. 499, and *Re Deane's Trusts*, [1900] 1 Ir. R. 332, followed *Emmins* v. *Bradford*.

(*x*) 24 T. L. R. 117.

(*y*) *Re Morgan*, [1920] 1 Ch. 196.

(*z*) See *Re Sutcliffe*, [1929] 1 Ch. 123.

as referring to the persons who would take beneficially on an intestacy under that part of the Act (s. 47).

How statutory next-of-kin take.

If a testator directs payment and division under the statute, and does not expressly state how the objects are to take, they take in the shares directed by the statute, and as tenants in common (*a*). This mode of distribution would be excluded by an express direction to divide in equal shares (*b*), but not by a mere direction to take as tenants in common, without specifying the shares (*c*), nor by the circumstance that the description excludes a person (*viz.*, the widow) who would have taken a share in case of actual intestacy, the whole fund being divided among the others as if they alone had been entitled under the statute (*d*).

The reference to the statute must, however, be unambiguous. Thus a gift to the "next-of-kin" of a married woman "as if she had died unmarried" has been held too doubtful a reference to the statute to let in any but the nearest relations (*e*). And a gift to the "legal or next-of-kin" has been held to bear the same construction as a gift to the next-of-kin (*f*).

Construction of gift to next-of-kin, exclusive of A.

Where personal property is bequeathed to the persons, exclusive of A, who under the statute would be the testator's next-of-kin, and A is in fact his sole next-of-kin, the property goes to those persons who, if A were out of the way, would be the testator's next-of-kin (*g*).

(*a*) *Bullock* v. *Downes*, 9 H. L. C. 1; *Martin* v. *Glover*, 1 Coll. 269; *Jenkins* v. *Gower*, 2 Coll. 537; *Horn* v. *Coleman*, 1 Sm. & G. 169; *Re Nightingale*, [1909] 1 Ch. 385. Lords Campbell and Brougham thought it more accurate to say that statutory next-of-kin do not take as joint tenants; 9 H. L. C. pp. 14, 17; *Re Ranking's Settlement*, L. R. 6 Eq. 601; *contra*, *Re Greenwood's Will*, 3 Gif. 390, *sed qu.* The rule established by *Bullock* v. *Downes* applies where the gift is to the next-of-kin of a person dead at the date of the will: *Re Rees*, 44 Ch. D. 484.

(*b*) *Per* Lord Langdale, *Mattison* v. *Tanfield*, 3 Bea. 132. And see corresponding cases on gifts to "relatives," *post*, p. 1601 *seq.* *Phillips* v. *Garth*, 3 Br. C. C., at p. 69. In *Holloway* v. *Radcliffe*, 23 Bea. 163, where the gift was "unto and equally amongst my legal personal representatives in such and the like manner as if the same had been to be paid under the Statute of Distribution," it was held by Romilly, M.R., that the testator's widow took one-third and his son two-thirds. See *Smith* v. *Palmer*, 7 Hare, 225, *post*, p. 1586.

(*c*) This passage is quoted by Swinfen Eady, J., in *Re Richards*, [1910] 2 Ch., at p. 77. *Mattison* v. *Tanfield*, 3 Bea. 131; *Lewis* v. *Morris*, 19 Bea. 34. *Contra Richardson* v. *Richardson*, 14 Sim. 526, and *Godkin* v. *Murphy*, 2 Y. & C. C. C. 351 ("persons entitled under the statute"); but both cases were plainly disapproved, 9 H. L. C. pp. 28, 29, and the former was questioned by the Judge who decided it, 8 Hare, p. 307.

(*d*) *Bullock* v. *Downes*, *dub.* Lord Wensleydale, 9 H. L. C. 1, pp. 22, 26.

(*e*) *Halton* v. *Foster*, L. R. 3 Ch. 505. See also *Lucas* v. *Brandreth* (*No.* 2), 28 Bea. 274; *Re Webber's Settlement*, 17 Sim. 221 but *quære* as to the *ratio decidendi.*

(*f*) *Harris* v. *Newton*, 46 L. J. Ch. 268.

(*g*) *White* v. *Springett*, L. R. 4 Ch. 300; *Re Taylor*, 52 L. T. 839. Compare *Lindsay* v. *Ellicott*, 46 L. J. Ch. 878 (limitation in settlement by deed to statutory next-of-kin "exclusive of A and his representatives").

Exclusion by implication.

If a testator bequeaths personal property to A for life and after his death to B for life, and then to "my other next-of-kin," and A happens to be the sole next-of-kin at the testator's death, he is excluded by force of the word "other" (*h*). *Bird* v. *Wood* (*i*) is another example of true next-of-kin being excluded by the context. But if a testator gives a life interest to A and B, with remainder to his own next-of-kin, and A and B answer that description, they are not excluded by the fact that a life interest has been expressly given them (*k*).

Gift to next-of-kin of a particular name.

It seems never to have been decided whether in case an additional term of description be annexed to a gift to next-of-kin, as if property be given to next-of-kin of a particular name, and the true next-of-kin do not bear that name, the nearest relations who do bear it can take under the will (*l*). The question was discussed, but à decision expressly avoided, in *Doe* d. *Wright* v. *Plumptre* (*m*).

Assumption of name.

Where there is a devise of land to the "first and nearest of my kindred being male and of my name and blood," only those who are of the name as well as of the blood can claim; and the qualification as to the name is not satisfied by an assumption of it by royal licence (*n*). Acccording to some of the older cases, a woman whose maiden name is that of the testator cannot claim under such a devise if she changes her name by marriage during the testator's lifetime (*o*), or even before the devise takes effect (*p*). In *Carpenter* v. *Bott* (*q*), it was held by Shadwell, V.-C., that a woman whose maiden name was C. was entitled under a bequest to the testator's next-of-kin of the surname of C., although she married (after the testator's death) before the fund fell into possession. The V.-C. seems to have thought that "surname" meant "stock" (*r*).

Change of name by marriage.

(*h*) See *Cooper* v. *Denison*, 13 Sim. 290, *post*, p. 1620.

(*i*) 2 S. & St. 400, stated *post*, p. 1619; *Elmsley* v. *Young*, 2 My. & K. pp. 86, 89.

(*k*) *Gorbell* v. *Davison*, 18 Bea. 556.

(*l*) See the corresponding cases on gifts to the heir, *ante*, p. 1529.

(*m*) 3 B. & Ald. 474 (deed). The decision was that the plaintiff's wife answered neither branch of the description. If "name" was to be literally understood (as to which, *post*, p. 1624), she did not bear it at the prescribed time: if "name" meant "family," there was another of that family more nearly related. Shadwell, V.-C., is reported to have taken a different view of the decision, *Carpenter* v. *Bott*, 15 Sim., at p. 609; but see *S.C.* 16 L. J. Ch. 433.

(*n*) *Leigh* v. *Leigh*, 15 Ves. 92. See *Barlow* v. *Bateman*, 2 Br. P. C. 272, stated *ante*, p. 1515. If the gift were to next-of-kin *bearing* the testator's name the result might be different. See *Re Roberts*, 19 Ch. D. 520, *post*, p. 1626.

(*o*) *Jobson's Case*, Cro. El. 576.

(*p*) *Bon* v. *Smith*, Cro. El. 532.

(*q*) 15 Sim. 606.

(*r*) See *Pyot* v. *Pyot*, 1 Ves. sen. 335, referred to *post*, p. 1625.

Artificial class.

In *Re Bulcock* (*s*), on the death of a tenant for life, estates were devised "to the use of the nearest of kin of myself who shall then be living and who shall be a male bearing the name of Bulcock his heirs and assigns for ever provided nevertheless that such person shall not claim through or under my late brother Ambrose Bulcock." It was held that the testator had created an artificial class of kin to consist of persons living at the death of the tenant for life who were related to the testator, were male, bore the name of Bulcock and were not descendants of Ambrose, and that of the persons so ascertained those who were nearest in blood to the testator were entitled.

Gift to next-of-kin *ex parte materna.*

Under a bequest to the next-of-kin, *ex parte materna*, a person who happens to be next-of-kin on the father's, as well as on the mother's side, will be entitled (*t*), unless the testator has expressly excluded the former (*u*).

In *Dugdale* v. *Dugdale* (*x*), the gift was to the testator's next-of-kin, both maternal and paternal. It was held that they took *per capita.*

"Nearest of kin in the male line in preference to the female line."

In *Boys* v. *Bradley* (*y*), a testator, who died a bachelor, leaving several brothers and sisters his nearest relations, gave personal estate to be accumulated for the term of twenty-one years, and then to go to "his then nearest of kin in the male line in preference to the female line." At the end of the term the property was claimed by a sister, the sole survivor at that time of the nearest relations; by his nephews, the sons of sisters, claiming simply as male representatives of the family; and by a more remote male relation claiming wholly through males. It was held by Wood, V.-C., that the sister was entitled. An appeal by the remote relation was dismissed first by K. Bruce and Turner, L.JJ., and afterwards by the House of Lords, it being considered clear that he was not the person designated.

"Next male kin."

In *Re Chapman* (*z*), a testator devised freeholds in certain proportions to two persons, "and in the event of either dying, the deceased's share to revert to the next male kin." It was held by North, J., that all the nearest of kin of the testator, being males, living at his death, took as joint tenants in fee simple in reversion expectant on the death of the tenants for life.

(*s*) [1916] 2 Ch. 495.

(*t*) *Gundry* v. *Pinniger*, 14 Bea. 94; 1 D. M. & G. 502.

(*u*) See *Say* v. *Creed*, 5 Hare, 580. A bequest to "next-of-kin in the male line *in preference to* the female line," does not exclude but only postpones the latter, *semb. Boys* v. *Bradley*, 10 Hare, at p. 399; 4 D. M. & G. 58; 5 H. L. C. pp. 892, 900.

(*x*) 11 Bea. 402.

(*y*) 10 Hare, 389; 4 D. M. & G. 58; 5 H. L. C. 873 (*Sayer* v. *Bradly*).

(*z*) 32 W. R. 424.

"Nearest of kin by way of heirship."

In *Williams* v. *Ashton* (*a*), a testator devised land to her "nearest of kin by way of heirship," and the heir not being one of the nearest of kin, it was argued that he was not entitled; but Wood, V.-C., decided that he was, that the word heirship must be referred to the subject of gift, which was realty, and that the testatrix meant the nearest in the line through which real estate would descend; in short (though it was a circuitous way of expressing it) the heir. And, on the other hand, a gift of personalty to "the heirs or next-of-kin of A deceased," was held a bequest to the persons who would by law succeed to property of that description, *viz.*, the statutory next-of-kin (*b*).

"Heirs or next-of-kin."

"Next kin or heir-at-law."

In *Lowndes* v. *Stone* (*c*), a testator by unattested will dated in 1795, gave all his estate and effects to his "next kin or heir-at-law whom I appoint my executor": it was held that the personalty went to the next-of-kin. There was no realty. In *Re Thompson's Trusts* (*d*) the testator bequeathed personalty to "the heirs or next-of-kin" of A: it was held that the statutory next-of-kin of A were entitled, and not the next-of-kin in the proper sense of the term: this was owing to the use of the word "heirs" (*e*).

"Heirs or next-of-kin."

Next-of-kin of persons other than testator.

Questions on gifts to next-of-kin generally arise where the relationship is to be defined with reference to the testator himself, but sometimes it has reference to other persons. In *Pycroft* v. *Gregory* (*f*), there was a devise of land to the next-of-kin of J. and T., the father and mother of the testatrix, who was their only descendant, so that no person could be next-of-kin to both J. and T.: it was held that the devise failed. But in *Re Soper* (*g*), where the gift was to the nearest of kin of a deceased husband and wife who had not been related before marriage, it was held (distinguishing *Pycroft* v. *Gregory*) that the gift was to a class consisting of the nearest of kin of the husband and the nearest of kin of the wife and not to a class consisting of persons who were nearest of kin to both of them. In *Rook* v. *Att.-Gen.* (*h*), where the testator gave his residue to his wife for life and after her death "upon trust for my and her next-of-kin in equal shares," it was held to be a gift to a class which, if the testator had had any next-of-kin, would have been composed of them and of the wife's next-of-kin, all taking *per capita*.

Nearest of kin of husband and wife.

(*a*) 1 J. & H. 115.
(*b*) *Re Thompson's Trusts*, 9 Ch. D. 607.
(*c*) 4 Ves. 649. See 10 Cl. & F. p. 253, and compare *Re Hudson*, 72 L. T. 892, *ante*, p. 1579.
(*d*) 9 Ch. D. 607.
(*e*) *Ante*, p. 1544.
(*f*) 4 Russ. 526.
(*g*) [1912] 2 Ch. 467.
(*h*) 31 Bea. 313.

If personalty is bequeathed by a domiciled Englishman to the "next-of-kin" of a foreigner, the next-of-kin must be ascertained according to English law (*i*).

Next-of-kin of foreigner.

The principle recognised in *Seale-Hayne* v. *Jodrell* (*k*), namely, that if a testator in one part of his will treats named illegitimate relations as legitimate, he may fairly be presumed to include them in a gift to legitimate relations as a class, applies to gifts to next-of-kin, and consequently in *Re Wood* (*l*), where a testator gave his residue upon trusts for each of his seven named children (three of whom were illegitimate), with an ultimate trust for the next-of-kin of each daughter, it was held that the gift took effect in the same way as if all the children had been legitimate.

Illegitimate next-of-kin, or next-of-kin of bastard.

V.—Gifts to Legal or Personal Representatives, Executors or Administrators :—(i) *How construed generally.*—Mr. Jarman continues (*m*): "The construction of the words 'legal representatives' (*n*), or 'personal representatives,' has presented another perplexing and fruitful topic of controversy. Each of these terms, in its strict and literal acceptation, evidently means 'executors,' or 'administrators,' who are, properly speaking, the 'personal representatives' of their deceased testator or intestate (*o*); but as these persons sustain a fiduciary character, it is improbable that the testator should intend to make them beneficial objects of gift; and almost equally so, that he should mean them to take the property as part of the general personal estate of their testator or intestate, which is, in effect, to make *him* the legatee (*p*). Accordingly, in numerous cases, the term 'legal representative,' or 'personal representative,' has been construed as synonymous with *next-of-kin*, or rather as descriptive of the person or persons taking the personal estate under the Statutes of Distribution, who may be said, in a loose and popular sense, to 'represent' the deceased." Con-

"Legal representatives" or "personal representatives," how construed.

(*i*) *Re Fergusson's Will*, [1902] 1 Ch. 483.

(*k*) [1891] A. C. 304, affirming C. A. in *Re Jodrell*, 44 Ch. D. 590.

(*l*) [1902] 2 Ch. 542, overruling *Re Standley's Estate*, L. R. 5 Eq. 303, *post*, p. 1759. Compare *Re Deakin*, [1894] 3 Ch. 565 and the cases cited or referred to *post*, p. 1606.

(*m*) First ed., Vol. II, p. 39.

(*n*) This term was thought by K. Bruce, V.-C., less precise than "personal" or "legal personal representatives": *Topping* v. *Howard*, 4 De G. & S. 268; *Smith* v. *Barneby*, 2 Coll. p. 736. But see 2 Hare, pp. 523, 524; 2 Drew, at p. 235; 4 De G. & J., at p. 484.

(*o*) *Saberton* v. *Skeels*, 1 R. & My. 587; *Hinchcliffe* v. *Westwood*, 2 De G. & S. 216; *Smith* v. *Barneby*, 2 Coll. 728; *Re Crawford's Trusts*, 2 Dr. 230; *Re Ware*, 45 Ch. D. 269.

(*p*) Mr. Jarman must be understood as referring to cases where the gift is to take effect at the death of the testator; if there is a previous life estate the general rule is that "personal representatives" means "executors or administrators": *Re Crawford's Trusts*, *post*, p. 1587, n. (*b*).

sequently, if the deceased left a widow, she will be included (*q*). But a husband is not entitled under such a gift (*r*).

In order, however, that "representatives" (with or without the addition of "legal" or "personal") should be so construed, there must be something in the scheme or context of the will from which the testator's intention may be inferred. The most important class of cases in which this construction has prevailed are those in which the gift to the representatives is by way of substitution.

Personal representative held to mean executor or administrator.

In *Re Brooks* (*s*), the testator gave his residuary estate upon trust to pay the income to his widow for life and after her death to divide the same equally between his seven named children during their respective lives and after the death of any child to hold one-seventh of the capital, to the income of which such child would have been entitled had he or she survived the testator, upon trust for the personal representative of that child. The Court of Appeal held (following *Re Crawford's Trusts* (*t*)), that the words "personal representative" must receive their ordinary meaning of executor or administrator; and overruled *Bridge* v. *Abbot* (*u*) and *Cotton* v. *Cotton* (*x*), in each of which "legal representatives" was held to mean next-of-kin.

"Personal representative" held to mean next-of-kin.

In *Baines* v. *Ottey* (*y*), where a testator gave certain real and personal estate to trustees, in trust for such persons as A (a married woman) should appoint, and in default of appointment, for her separate use, and at her decease, to convey the real estate to such person or persons as would be the heir-at-law of the said A, and to assign the personal estate to or amongst such person or persons as would be the personal representative of the said A; Leach, M.R., held the next-of-kin to be entitled.

Smith v. *Palmer.*

And in *Smith* v. *Palmer* (*z*), where a testator, after the death of his wife, gave his property to A "if he should be then living, but if he should be then dead, to his legal representative or

(*q*) *Cotton* v. *Cotton*, 2 Bea. 67; *Smith* v. *Palmer*, 7 Ha. 225; *Holloway* v. *Radcliffe*, 23 Bea. 163. But the testator may show that he means the true next-of-kin and not the statutory next-of-kin. See cases cited *post*, pp. 1587, 1588. And as to the claim of the widow, see *Booth* v. *Vicars*, *ib.*

(*r*) *King* v. *Cleaveland*, 26 Bea. 166; 4 De G. & J. 477; *Doody* v. *Higgins*, 2 K. & J. 729.

(*s*) [1928] 1 Ch. 214.

(*t*) 2 Drew. 230.

(*u*) 3 B. C. C. 224. See also *Long* v. *Blackall*, 3 Ves. 486; *Jacob* v. *Catling*, [1881] W. N. 105; *Re Thompson*, [1886] W. N. 130. See *Hewitson* v. *Todhunter*, 22 L. J. Ch. 76, where, however, the universal legatee, not the next-of-kin, of the original legatee, was held entitled, but the decision seems to be erroneous. *Leak* v. *Macdowall*, 33 Bea. 238, referred to *post*, p. 1594, n. (*y*), was an exceptional case.

(*x*) 2 Bea. 67.

(*y*) 1 My. & K. 465, 2 Coll. 733 n.

(*z*) 7 Hare, 225; see also *Wilson* v. *Pilkington*, 11 Jur. 537; *King* v. *Cleaveland*, 26 Bea. 26, 4 De G. & J. 477; *Holloway* v. *Radcliffe*, 23 Bea. 163.

representatives, if more than one, share and share alike"; Wigram, V.-C., held that these words meant next-of-kin according to the Statutes of Distribution, and that they took in equal shares.

"Legal representatives according to the course of administration."

Again, in *Jennings* v. *Gallimore* (*a*), where, by deed, a fund was vested in trustees, in trust to pay it to such persons as A should by deed or will appoint, and, in default of appointment, then to "the legal representatives of A, according to the course of administration." A by his will appointed the fund "to be paid by the said trustees unto my legal representatives according to the course of administration," and gave all the rest of his property to B, and appointed B and C executors; it was held by Arden, M.R., that the next-of-kin of A were entitled under the appointment. "The testator (he said) would never have made such a will if he had thought all the words he had used came to nothing more than executing the power by giving the fund to B"—*i.e.*, by giving it to the executors for them to administer by paying it, as in due course they would have been bound to do, to B.

In the last three cases the direction as to the mode in which the trust fund was to be paid, shared, or enjoyed, was held to be sufficient evidence that the testator did not use the words "personal representatives" in their strict sense.

"Representatives."

The same principle of construction applies where the gift is to "the representatives," without the addition of "legal" or "personal" (*b*). Without some controlling context, a substitutional gift to personal representatives, in cases where there is a preceding life estate, is *prima facie* construed a gift to the executors or administrators (*c*).

Effect of limitation to executors or administrators in same will.

And as a testator is supposed to have a different meaning whenever he uses a different expression, it is always a circumstance favourable to the construction which reads the words "legal" or "personal representatives" as denoting *next-of-kin*, that there is elsewhere in the same will, and in reference to another subject of disposition, a gift to the executors or administrators of the same individual (*d*).

(*a*) 3 Ves. 146. See also *Briggs* v. *Upton*, L. R. 7 Ch. 376.

(*b*) *Re Horner*, 37 Ch. D. 695. The primary meaning of "representatives" is "legal personal representatives": *Re Crawford's Trusts*, 2 Dr. 230; *Re Ware*, 45 Ch. D. 269.

(*c*) *Re Crawford's Trusts*, 2 Dr. 230; *Re Ware*, 45 Ch. D. 269, and other cases, cited *post*, p. 1592.

(*d*) The mere use by the testator of the words "executors and administrators" in other parts of the will does not usually affect the construction: *Hinchcliffe* v. *Westwood*, 2 De G. & S. 216; *Re Ware*, 45 Ch. D. 269.

Thus, in *Walter* v. *Makin* (*e*), where a testator gave £450 to trustees, in trust for his son for life, and, after his son's decease, to pay thereout two legacies of £100 each to two of his daughters, and to pay the residue to the legal representatives of his son; and he gave the residue of his personal estate to his son, his executors, administrators, and assigns; Shadwell, V.-C., held that the words "legal representatives" meant next-of-kin (*f*).

Gift to "executors or administrators."

Formerly, the leaning in favour of the construction which gives to words pointing at succession or representation the sense of next-of-kin, was so strong that even a gift to "executors" or "administrators" has been thus construed (*g*). But it is clear that at the present day such a gift would be construed as a gift to the executors or administrators of the deceased legatee to be held by them as part of his estate (*h*).

Effect of added words.

A testator may also show that he uses "representatives" as meaning next-of-kin by adding explanatory words: as where the gift is to "the next legal or personal representatives" (*i*). In *Re Gryll's Trusts* (*k*), there were trusts for such persons related by blood to A as she should appoint, and in default for such persons as would be the personal representatives of A in case she died unmarried, and in a codicil these trusts were referred to as being "for the benefit of A's relations and next-of-kin": it was held that by "personal representatives," the statutory next-of-kin were meant. So a gift to "such persons as shall be the legal personal representatives" of the testator or another person at some future time will generally be construed to mean the statutory next-of-kin (*l*). But if the gift is to the "personal

(*e*) 6 Sim. 148. The opposite inference is obviously deducible from the circumstance of "personal representatives" being elsewhere used in the sense of "executors": *Dixon* v. *Dixon*, 24 Bea. 129.

(*f*) *Robinson* v. *Smith*, 6 Sim. 47. See also *Re Thompson*, 55 L. T. 85; *Jennings* v. *Gallimore*, 3 Ves. 146; *Nicholson* v. *Wilson*, 14 Sim. 549; *Walker* v. *Marquis of Camden*, 16 Sim. 329; *Booth* v. *Vicars*, 1 Coll. pp. 10, 11: *per* Wickens, V.-C., L. R. 7 Ch., at p. 378 n. But see *per* Kindersley, V.-C., *Re Crawford's Trusts*, 2 Drew., at p. 240.

(*g*) *Palin* v. *Hills*, 1 My. & K. 470; and see *Bulmer* v. *Jay*, 4 Sim. 48; 3 My. & K. 197.

(*h*) *Re Clay*, 54 L. J. Ch. 648. See also *Wallis* v. *Taylor*, 8 Sim. 241, stated *post*, p. 1595; *Long* v. *Watkinson*, 17 Bea. 471, *post*, p. 1593; *Webb* v. *Sadler*, L. R. 8 Ch. pp. 419, 429 (settlement). *Palin* v. *Hills* must be regarded as overruled.

(*i*) *Booth* v. *Vicars*, 1 Coll. 6; *Stockdale* v. *Nicholson*, L. R. 4 Eq. 359. In such a case it is not clear whether the persons entitled are the true next-of-kin or the statutory next-of-kin. It is submitted that the opinion of Knight Bruce, V.-C., in *Booth* v. *Vicars*, in favour of the statutory next-of-kin, is to be preferred to that of Malins, V.-C. Although in *Booth* v. *Vicars*, Knight Bruce, V.-C., used the word "consanguinity," he expressly guarded himself on a subsequent occasion (*Wilson* v. *Pilkington*, 11 Jur. 537), against the supposition that he intended thereby to exclude the widow. *Robinson* v. *Smith*, 6 Sim. 47, proceeded on special grounds, as did *Bulmer* v. *Jay*, 4 Sim. 48, 3 My. & K. 197.

(*k*) L. R. 6 Eq. 589.

(*l*) *Long* v. *Blackall*, 3 Ves. 486; *Robinson* v. *Evans*, 43 L. J. Ch. 82.

representatives or next-of-kin," it seems that the next-of-kin in the proper sense of the word, and not the statutory next-of-kin, are meant, and they take as joint tenants (*m*). And the same result follows if the gift is to "the executors, or administrators, or other legal representatives of her proper own blood and kindred" (*n*).

Where "representatives" means the statutory next-of-kin, the manner and proportions in which they take are regulated by the statute (*o*), unless they are expressly directed to take equally (*p*).

Where "representatives" means the true next-of-kin, they take as joint tenants (*q*).

"Personal representatives" held to mean "descendants."

In some cases, however, "personal representatives" has been held to mean "descendants." In *Styth* v. *Monro* (*r*), a testatrix bequeathed her residuary estate "in various shares to the respective representatives" of persons who were related as sisters: it was held that this meant their descendants. So, in *Atherton* v. *Crowther* (*s*), where there was a residuary bequest to the testator's wife for life, remainder to the children of A living at A's death, "but if any of the said children should die in A's lifetime, then for the personal representatives of such child or children to take *per stirpes* and not *per capita*"; and in another clause there was a gift "in case there should be no such children nor any representatives of such children living at A's death, then to the persons who should be the testator's next-of-kin"; it was held by Romilly, M.R., that the words personal representatives meant descendants. The same construction prevailed in *Re Knowles* (*t*).

"Natural representatives."

In *Re Bromley* (*u*), the expression "natural representatives according to the statute rule of distribution," was held to mean lineal descendants.

(*m*) *Philps* v. *Evans*, 4 De G. & S. 188; *Baker* v. *Gibson*, 12 Bea. 101.

(*n*) *Re Morgan's Trust*, 2 W. R. 439.

(*o*) See *Booth* v. *Vicars*, 1 Coll. 6; *Rowland* v. *Gorsuch*, 2 Cox, 187, *ante*, p. 1560; *Alker* v. *Barton*, 12 L. J. Ch. 16. The decision in *Walker* v. *Marquis of Camden*, 16 Sim. 329, is generally considered to be erroneous. See Hawkins on Wills (3rd ed.), pp. 126, 143.

(*p*) *Smith* v. *Palmer*, 7 Hare, 225. In *Holloway* v. *Radcliffe*, 23 Bea. 163. "equally" was neutralised by "in like manner as under the statute." In *Booth* v. *Vicars*, 1 Coll. 6, where the gift was to "next legal representatives of A & B, share and share alike," the words "share and share alike" were held to refer to A and B only, so as to make equal division between the stocks. See *Fielden* v. *Ashworth*, L. R. 20 Eq. 410, *post*, p. 1605.

(*q*) *Stockdale* v. *Nicholson*, L. R. 4 Eq. 359, following *Withy* v. *Mangles*, 10 Cl. & F. 215.

(*r*) 6 Sim. 49. Compare *Horsepool* v. *Watson*, 3 Ves. 383, where "representatives" seems to have been construed "issue," and *Re Booth's Settled Estates*, [1877] W. N. 129, where "legal" representatives was held to mean "children."

(*s*) 19 Bea. 448.

(*t*) 59 L. T. 359.

(*u*) 83 L. T. 315.

CHAPTER XLI.

"Personal representatives" strictly construed.

The general rule that the expression "representatives" or "personal representatives," *prima facie*, means "executors or administrators," is illustrated by the case of *Smith* v. *Barneby* (*x*), where a testator gave leasehold and copyhold property upon trusts in strict settlement, and declared that in default of any person becoming entitled thereto under those trusts the same should be in trust for "my personal and not my real representative"; he gave the residue of his personal estate to his wife, and appointed her sole executrix: it was held that she was entitled, both as executrix and beneficially, although the testator's reference to his "real representative" (meaning his heir) might plausibly be held to show that by "personal representative" he meant his next-of-kin.

"Executors or administrators" used as words of limitation.

Those cases in which legal personal representatives take by direct gift must, however, be carefully distinguished from those in which the words "executors and administrators," or "legal representatives," are used as mere words of limitation. As in the common case of a gift to A and his executors or administrators, or to A and his legal representatives, which will, beyond all question, vest the absolute interest in A (*y*).

Life estate given to A and ultimate trust for A's executors or personal representatives.

The same construction, too, in some instances, has been applied in cases of a more doubtful complexion; as where the bequest was to A for life, and, after his decease, to his executors or administrators (*z*) or personal representatives (*a*). So, in numerous instances, where a testator has given a fund in trust for A for life (frequently a married woman), with power to appoint it after her death, and, in default of appointment, to the "executors and administrators," or to the "personal representatives" of A, the words have received this their proper interpretation. A was considered to be the only object of bounty, and the words were held to be in effect mere words of limitation (*b*). And a trust for children which fails (*c*), or a clause of forfeiture on alienation or bankruptcy which is not

(*x*) 2 Coll. 728.

(*y*) *Lugar* v. *Harman*, 1 Cox, 250; *Taylor* v. *Beverley*, 1 Coll. 108; *Appleton* v. *Rowley*, L. R. 8 Eq. 139. *Ante*, p. 1152.

(*z*) Co. Lit. 54 b; *Sockett* v. *Wray*, 4 B. C. C. 483. See other cases, *post*, Chap. XLVIII. *Nurse* v. *Oldmeadow*, 5 L. J. Ch. 300, *cor.* Shadwell, V.-C., is *contra*, unless distinguishable on the ground that the limitation was to the executor, in the singular. *Sed qu.*

(*a*) *Alger* v. *Parrott*, L. R. 3 Eq. 328.

(*b*) *Saberton* v. *Skeels*, 1 R. & My. 587; *Att.-Gen.* v. *Malkin*, 2 Phill. 64; *Re Creagh*, [1920] 1 Ir. R. 8; *Devall* v. *Dickens*, 9 Jur. 550; *Page* v. *Soper*, 11 Hare, 321 (settlement). See Chap. XXXIII. If A becomes bankrupt the trustee is entitled to the fund as part of A's estate; *Re Seymour's Trusts*, Joh. 472; and see *Webb* v. *Sadler*, L. R. 8 Ch. 419; *Mackenzie* v. *Mackenzie*, 3 Mac. & G. 559 (appointment of policy on appointor's life to his own executors); *Re Onslow*, [1888] W. N. 167 (settlement, *f. c.* since M. W. P. Act, 1882).

(*c*) *Allen* v. *Thorp*, 7 Bea. 72 (settlement); *Re Wyndham's Trusts*, L. R. 1 Eq. 290; *Re Best's Settlement Trusts*, L. R. 18 Eq. 686 (settlement).

called into action (*d*), interposed between the life estate and the ultimate trust, will not affect the construction. But this rule of construction will be excluded if the testator adds a clause fixing the manner in which the executors or representatives are to be ascertained (*e*).

Limitation to executors, administrators, *and assigns.*

And it should seem that where the word "assigns" is subjoined to "executors and administrators," they are always read as words of limitation, and not as designating next-of-kin. Thus, in *Grafftey* v. *Humpage* (*f*), where a sum of £4,000 was bequeathed by A to trustees, in trust for his wife and daughter and the survivor for life, for their separate use, and after the decease of the survivor, in trust for the daughter's children, if any, and if none, then the testator gave one moiety of the £4,000 to his brother I., and the other moiety to such persons as the daughters should by deed or will appoint, and in default, to the executors, administrators, or assigns of the daughter. It was held that this gave her an absolute interest.

Gifts to "representatives" by substitution.

But the strict or literal construction of the words "executors" or "representatives" is not confined to cases where they are thus in form mere words of limitation. It will also generally obtain where there is a prior gift to A, and the gift to his executors or representatives is in the form of a substitution for him in case of his death. Thus, in *Price* v. *Strange* (*g*), a testator devised real estate to his wife during widowhood, and at her death or marriage, to trustees upon trust for sale, and directed that, in case the death or second marriage of his wife should not happen until his youngest child, being a son, should have attained twenty-three, or, being a daughter, should have attained that age, or be married with consent, his trustees should, immediately after the receipt of the money arising from the said real estates, pay and divide the same among such of his children as should be then living, and the legal representative or representatives of him, her or them, as should be then dead; and in case such death or marriage of his said wife should happen during the minority of any of his said children, then the testator directed the trustees to pay an equal proportion of the said money to such of his children as should, at that time, be entitled to receive their shares, in case he, she, or they had been

(*d*) *Webb* v. *Sadler*, L. R. 8 Ch. 419.

(*e*) *Re Hall*, [1893] W. N. 24.

(*f*) 1 Bea. 46. See also *Waite* v. *Templer*, 2 Sim. 524; *Hames* v. *Hames*, 2 Kee. 646; *Howell* v. *Gayler*, 5 Bea. 157; *Holloway* v. *Clarkson*, 2 Hare, 521; *Spence* v. *Handford*, 27 L. J. Ch. 767; 4 Jur. (N.S.) 987; cf. *Re Newton's Trusts*, L. R. 4 Eq. 171, stated *ante*, p. 1542.

(*g*) 6 Madd. 159. See also *Corbyn* v. *French*, 4 Ves. 418; *Hinchcliffe* v. *Westwood*, 2 De G. & S. 216; *Taylor* v. *Beverley*, 1 Coll. 108; *Re Crawford's Trusts*, 2 Drew. 230; *Re Henderson*, 28 Bea. 656; *Chapman* v. *Chapman*, 33 Bea. 556; *Re Turner*, 2 Dr. & Sm. 501; *Re Wyndham's Trusts*, L. R. 1 Eq. 290.

then living, and if dead, then to his, her, or their legal representatives: Leach, V.-C., held, that legal representatives must be understood in their ordinary sense of "executors or administrators" and that this made it equivalent to a direction to pay at the death of the widow to the children, their executors or administrators; or, in other words, gave a vested interest to the children.

Distinction in regard to substitution between immediate and future gift.

It will be observed, that in this case, and in the others cited with it, the gift to the legatees or their representatives was to take effect after a previous life estate, *i.e.*, the event contemplated was the legatee surviving the testator, but dying before the tenant for life (*h*). A distinction was drawn by Sir R. Kindersley, V.-C. (*i*), between such a case and that of an immediate gift to A or his representatives without a previous life estate. In the former case, he thought there was no improbability in supposing the testator to have intended that the legacy should go to the legatee's executors or administrators as part of his personal estate; for then the legatee got the benefit of the bequest as a reversionary legacy, though he might not live to receive it. But, in the latter case, the testator was providing for the event of the intended legatee dying in his (the testator's) lifetime. In such event the intended legatee could not under any construction which could be put on the words "legal representatives" derive any advantage from the bequest; indeed, he would never even know of it. The V.-C. thought it highly improbable that the testator should intend the legacy to go to the executors or administrators as part of the legatee's general assets, perhaps to benefit no one but the legatee's creditors. He therefore held that in such a case the term "representatives" was properly construed next-of-kin, and that *Bridge* v. *Abbot* (*k*) and *Cotton* v. *Cotton* (*l*) were thus consistent with the other authorities. The two cases last mentioned were followed reluctantly in *Re Thompson*, 55 L. T. 85, but were overruled by *Re Brooks*, [1928] 1 Ch. 214, *ante*, p. 1586.

Re Ware.

Accordingly, in *Re Ware* (*m*), under gifts to A and B for life, with powers of appointment in favour of X, Y, and Z, "in failure of appointment to be equally divided between the three or their respective representatives," it was held that "representatives" meant executors or administrators.

Deferred gift to representatives in equal shares, etc.

But it does not follow that where a gift to representatives is

(*h*) If, in such case, the legatee died in the testator's lifetime, the legacy would lapse: *Corbyn* v. *French*, 4 Ves. 418. See *post*, p. 2093.
(*i*) *Re Crawford's Trusts*, 2 Drew., at p. 242.
(*k*) 3 B. C. C. 224, *ante*, p. 1586.
(*l*) 2 Bea. 67, *ante*, p. 1586.
(*m*) 45 Ch. D. 269.

preceded by a life estate, "representatives" is necessarily held to mean executors or administrators, for if the testator directs that the representatives are to take in equal shares (*n*), or that they are to take only the share which the original legatee would have taken (*o*), or otherwise indicates that they are to take beneficially (*p*), "representatives" will generally be held to mean statutory next-of-kin, unless the words of division can be referred to the original legatees: as in *Wing* v. *Wing* (*q*), where a fund was bequeathed to four persons for their lives and then to "the legal representatives" of the tenants for life, "to be equally divided between them, share and share alike"; it was held that the executors or administrators were entitled, and not the next-of-kin, the direction as to equal division being taken to refer to the sets of representatives.

Those cases in which the words "executors and administrators" are not used as words of limitation must now be considered.

Gifts to "executors" or "executors or administrators" are more strictly construed than gifts to "representatives" (*r*), and consequently a substitutional gift to "executors" will not, without further words, enure for the benefit of the next-of-kin (*s*). Thus, in *Long* v. *Watkinson* (*t*), where a testator bequeathed the residue of his estate to A, but in case of her death then "to the executors or executrixes whom A may appoint"; A died in the testator's lifetime; Romilly, M.R., decided that neither the residuary legatee nor the next-of-kin of A took the residue as *personæ designatæ*, but that it went to her executrix as part of her personal estate.

Gifts to "executors or administrators" as purchasers.

So, in *Re Valdez's Trusts* (*u*), where a testator gave his residuary real and personal property to M. and J., and in case of their decease bequeathed what he had bequeathed to them to their executors or administrators. Both M. and J. died in the lifetime of the testator. J., by her will, after making certain specific bequests, gave the residue of her property to the testator. It was held that the effect of the will was to give to the executors or administrators of each of them, M. and J., as part of her personal estate, one-half of the testator's property; and further

(*n*) *King* v. *Cleaveland*, 4 D. & J. 477; *Smith* v. *Palmer*, 7 Ha. 225.
(*o*) *Re Horner*, 37 Ch. D. 695 (either next-of-kin or descendants).
(*p*) *Baines* v. *Ottey*, 1 M. & K. 465.
(*q*) 24 W. R. 878.
(*r*) See *per* Lord Cottenham, *Daniel* v. *Dudley*, 1 Phil., at p. 6; and *per* Sir J. Romilly, M.R., *Atherton* v. *Crowther*, 19 Bea., pp. 450, 451.
(*s*) See *Re Clay*, 54 L. J. Ch. 648, and other cases cited *ante*, p. 1588, note (*h*).
(*t*) 17 Bea. 471.
(*u*) 40 Ch. D. 159.

that the moiety of J. was held by her executors in trust for the testator himself as residuary legatee under her will; and that such moiety had by the death of J. in the testator's lifetime lapsed, and accordingly was undisposed of, and went to the testator's next-of-kin.

Again, a gift to such of a class as shall be living at a time stated, and "the executors or administrators of such of them as shall be then dead," will, *prima facie*, go to the legal personal representatives, and not to the next-of-kin (*x*). And a gift to the "executors" or "representatives" of A (who is dead at the date of the will) receives the same construction (*y*).

But of course a testator may add explanatory words which show that by "executors or administrators" he means next-of-kin (*z*).

Whether executors or administrators are entitled for their own benefit;

Notwithstanding the decision in *Evans* v. *Charles* (*a*), in which it was held that under a bequest to the legal personal representatives of a deceased person, his administratrix took for her own benefit, it may now be considered established, that, unless a contrary intention appears by the context, whatever is bequeathed to the executors or administrators of a person (*b*) vests in them as part of his personal estate.

Thus, where (*c*) a testator bequeathed £500 to B after the death of A, and if B died in A's lifetime, then to such persons as B should by will appoint, and, in default of appointment, to his executors or administrators; Lord Langdale, M.R., held that the executor of B was bound to apply the legacy according to the purposes of the will.

And the same rule prevails though the original gift is immediate, and the legatee dies in the testator's lifetime (*d*), or is dead at the date of the will (*e*).

—in case of real estate.

It has also been held applicable to the case of real estate, the gift in that case being held equivalent to a declaration that the

(*x*) *Re Seymour's Trusts*, Joh. 472.

(*y*) *Trethewy* v. *Helyar*, 4 Ch. D. 53; *Leak* v. *Macdowall*, 33 Bea. 238, where the declared motive for the bequest was that A and B (partners in trade) had lost a like amount by the testator, and it was held not a bequest to the firm so as to pass to the successors in business. As to this see *Kerrison* v. *Reddington*, 11 Ir. Eq. Rep. 451.

(*z*) As in *Re Morgan's Trust*, 2 W. R. 439, *ante*, p. 1589.

(*a*) 1 Anstr. 128. See *Long* v. *Blackall*, 3 Ves. 486; and *Churchill* v. *Dibben*, Sugd. Pow. (8th ed.), 312.

(*b*) By this is meant a person other than the testator himself; as to gifts by a testator to his own executors, see *ante*, p. 1084.

(*c*) *Stocks* v. *Dodsley*, 1 Kee. 325; see *Collier* v. *Squire*, 3 Russ. 467; *Morris* v. *Howes*, 4 Hare, 599 (deeds).

(*d*) *Long* v. *Watkinson*, 17 Bea. 471; *ante*, p. 1593. See also *Re Clay*, 32 W. R. 516, 52 L. T. 641.

(*e*) *Re Valdez's Trusts*, 40 Ch. D. 159; *Leak* v. *Macdowall*, 33 Bea. 238; *Maxwell* v. *Maxwell*, Ir. R. 2 Eq. 478; *Trethewy* v. *Helyar*, 4 Ch. D. 53.

estate shall be held by the executors as part of the personal estate of the person named (*f*).

If, however, the testator explicitly declares that the executors or administrators shall be entitled for their own benefit, this construction must prevail against any suggestion as to the improbability of such a mode of disposition.

Gifts to executors "for their own use."

As, in *Wallis* v. *Taylor* (*g*), where a testatrix bequeathed a fund to trustees in trust to pay the interest for the separate use of her daughter for life, and, after her decease, upon trust to transfer the principal to her executors or administrators, to and for his, her, or their use and benefit absolutely for ever; Shadwell, V.-C., held that the husband of the daughter, on his taking out administration, was absolutely entitled for his own benefit.

General conclusion.

The conclusion is that under a gift simply to "representatives," "legal representatives," "personal representatives," and to "executors and administrators," the hand to receive the property is that of the person constituted representative by the proper Court, and that it lies on those maintaining a different construction to show that the testator's intention is clearly so; but that the person so constituted will, in the absence of a clear intention to the contrary, take the property as part of the estate of the person whose representative he is, and not beneficially (*h*).

As to the effect of a gift to the personal representatives of A as part of her personal estate and A is dead leaving an insufficient estate, see *Re Bosanquet* (*i*).

Construction of gift to executors of testator himself.

(ii) *Where gift is to executors, etc., of testator himself.*—Where a testator bequeaths property to his own executors, the question sometimes arises whether they take beneficially or not. This question is discussed in another chapter (*k*).

Lapse.

Where there is a gift to executors beneficially as tenants in common, and one of them dies in the testator's lifetime, the question may arise whether his share lapses (*l*).

(*f*) *Per* Romilly, M.R., *Dixon* v. *Dixon*, 24 Bea., at p. 135; *Wellman* v. *Bowring*, 2 Russ. 374, 3 Sim. 328.

(*g*) 8 Sim. 241. See also *Sanders* v. *Franks*, 2 Mad. 147. But see as to marriage settlements, *Hames* v. *Hames*, 2 Kee. 646; *Marshall* v. *Collett*, 1 Y. & C. 232; *Meryon* v. *Collett*, 8 Bea. 386; *Johnson* v. *Routh*, 27 L. J. Ch. 305. In *Smith* v. *Dudley*, 9 Sim. 125, an ultimate limitation in a settlement of the wife's property to "the executors and administrators of her own family" was held to carry it to her next-of-kin as *personæ designatæ*, although the ultimate limitation of the husband's property to the executors and administrators of his own family was held to give the husband the absolute interest.

(*h*) *Per* Wigram, V.-C., *Holloway* v. *Clarkson*, 2 Hare, at p. 523.

(*i*) 113 L. T. 152.

(*k*) Chap. XXX, *ante*, p. 1084.

(*l*) See above, p. 414.

(iii) *Gifts to executors, when annexed to the office.*—The question whether a bequest to an executor is beneficial or fiduciary, generally arises with reference to residuary gifts (*m*), but sometimes it arises with reference to a specific or pecuniary bequest (*n*).

Beneficial legacy to executor generally presumed to be given to him in that character.

When a testator gives to his executors, describing them as such, a specific or pecuniary legacy, which is clearly beneficial, the general rule, in the absence of indication of intention to the contrary, is to regard the legacy as given to the persons so described in their character of executors. And accordingly no such person will be entitled to claim the legacy unless he undertakes the duties of the office to which he has been appointed. "Nothing is so clear as that if a legacy is given to a man as executor, whether expressed to be for care and pains or not, he must, in order to entitle himself to the legacy, clothe himself with the character of executor" (*o*), either by proving the will, or by taking upon himself the duties of executor (*p*).

Thus, if a testator says "I give £50 to A as my executor" (*q*), or "for his trouble" (*r*), or "I appoint A my executor, desiring him to accept £100" (*s*), or if he appoints A his executor and in a subsequent part of the will gives a legacy to "the said A" (*t*), or if he gives a legacy to A and B "my executors hereinafter named," and in a subsequent part of the will appoints A and B executors of his will (*u*), or even if the appointment as executors follows the bequest of the legacy (*x*), in all such cases the legacy is regarded as annexed to the executorship.

Additional executor.

Where an additional executor is appointed by codicil, this does not, without more, entitle him to share in benefits given by the will to the original executors (*y*).

The presumption may be rebutted by indication of contrary intention.

But the presumption that a legacy to a person appointed executor is given to him in that character may be rebutted, if the legatee can satisfy the Court that it was the intention of

(*m*) See Chap. XXI, *ante*, p. 696.

(*n*) See Chap. XXX, *ante*, p. 1084.

(*o*) *Per* Lord Alvanley, M.R., in *Harrison* v. *Rowley*, 4 Ves., at p. 216. See also *Freeman* v. *Fairlie*, 3 Mer., at p. 31. As to the effect of a revocation of the appointment in also revoking the legacy, see *ante*, p. 161. As to acting as trustee, see *Browne* v. *Browne*, [1912] 1 Ir. R. 272.

(*p*) *Ib.*, *Lewis* v. *Mathews*, L. R. 8 Eq. 277, and other cases cited *post*, p. 1600.

(*q*) *Abbot* v. *Massie*, 3 Ves. 148.

(*r*) *Re Hawkin's Trusts*, 33 Bea. 570.

(*s*) *Reed* v. *Devaynes*, 2 Cox, 285; but see the remarks on this decision, *post*, p. 1597, note (*g*).

(*t*) *Calvert* v. *Sebbon*, 4 Bea. 222; *Hanbury* v. *Spooner*, 5 Bea. 630.

(*u*) *Slaney* v. *Watney*, L. R. 2 Eq. 418.

(*x*) *Piggott* v. *Green*, 6 Sim. 72; *Re Appleton*, 29 Ch. D. 893.

(*y*) *Hillersdon* v. *Grove*, 21 Bea. 518; *ante*, p. 661.

the testator that he should take the legacy independently of the executorship. If he should succeed in doing so, he will be entitled to receive his legacy, though he refuse to undertake the office. In *Stackpoole* v. *Howell* (*z*), Grant, M.R., said: "The question is whether you must not find circumstances to show that the legacy was intended for the executor in a distinct character; otherwise, the presumption is *prima facie* that it is given to him as executor."

What will be sufficient to indicate contrary intention.

A renouncing executor will be entitled to claim his legacy, if he can show that the testator intended him to take independently of his office by the context of the bequest, or by indications of such intention appearing in other parts of the will, or even, it has been said (*a*), by adducing parol evidence of such intention; but the view that parol evidence is admissible is, it is submitted, erroneous (*b*).

Words expressive of regard and affection.

The presumption may, accordingly, be rebutted, if the bequest itself contains expressions indicating that the testator's motive in giving the legacy was that of personal regard and affection, and not to provide a remuneration for trouble in administering the estate. Thus, in *Cockerell* v. *Barber* (*c*), a testator, after giving a legacy to his "friend and partner P.," appointed him one of the executors of the will, and made other devises and bequests in his favour, so that P. was entitled under the will to much greater benefits than any of the other executors (*d*). By a codicil, in which P. was referred to as one of the executors, a further legacy was given to him. It was held by Lord Eldon, C., that all the legacies were given to P. independently of his character of executor. The cases of *Re Denby* (*e*) and *Bubb* v. *Yelverton* (*f*), were similar.

Again, in *Burgess* v. *Burgess* (*g*), a legacy was given to each of the testator's trustees, naming them, as a mark of his respect

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(*z*) 13 Ves. 417.

(*a*) *Per* Cotton, L.J., in *Re Appleton*, 29 Ch. D., at p. 895, *dubitante* Fry, L.J., at p. 898.

(*b*) See Hawkins on Wills, 3rd ed., p. 362; Wigram, 5th ed., p. 227.

(*c*) 2 Russ. 585.

(*d*) See, however, on this point, *post*, p. 1599.

(*e*) 3 De G. F. & J. 350.

(*f*) L. R. 13 Eq. 131.

(*g*) 1 Coll. 367. And where a testator gave "to my executors herein named £50 each for the trouble they may have in the execution of this my will and also to mark my friendship and regard for them," it was held by Kekewich, J., that one of the executors was entitled to the legacy although he did not prove the will: *Crawford* v. *Forshaw*, 43 Ch. D., at p. 644. On the other hand, in *Reed* v. *Devaynes*, 2 Cox 285, 3 B. C. C. 95, where a testator appointed A and B his executors "desiring them to accept £100 each, as a mark of my gratitude for the friendship they have shown me," Lord Alvanley, M.R., seems to have paid no attention to these expressions of personal regard, but to have told B that he would not have the legacy unless he proved. But this may be regarded as inconsistent with the more recent authorities.

for them, and the testator appointed his wife and the legatees executors of his will. Knight Bruce, V.-C., held that the legacies were not revoked by a codicil appointing other trustees and executors in the room of those originally appointed, and giving legacies of equal amount to the newly appointed trustees and executors in similar language.

Mention of testator's relationship to the legatee-executor.

Similarly, the description of a legatee named as executor by his degree of relationship to the testator has been held sufficient to rebut the presumption that the legacy is annexed to the office (*h*).

Legacy subject to prior life-interest.

The presumption has in several cases been held to be rebutted where a legacy to a person named executor was given in remainder expectant on the determination of a life-interest. Thus (*i*), where a testator, by a codicil, gave to M. a legacy of £200, and appointed him an executor, and in case the testator's son should die a lunatic, then he gave £200 to the said M., Stuart, V.-C., held that the latter gift was at any rate not annexed to the office, and that M. took it, though he had not proved the will; and his Honor thought that, whatever might have been the case as to the first legacy if it had stood by itself, putting the two passages together, M. was entitled to both (*k*).

So, where (*l*) a testatrix gave the residue of her personal estate upon trust to pay the income to M. for her life, and after her decease upon trust to pay thereout a legacy of £100 to P., and, subject thereto upon certain further trusts, and she appointed P. one of her executors; it was held by Jessel, M.R., that the fact of the legacy having been given to P. after the death of M., rebutted the presumption that it was given to him in his character of executor.

It has been held in an Irish case (*m*) that a direction that in the event of the executor-legatee's death before the testator, the legacy shall go to his next-of-kin, will rebut the presumption that the legacy is given to him in his character of executor.

Gift of residue.

Shadwell, V.-C., held in two cases (*n*) that the presumption

(*h*) *Dix* v. *Reed*, 1 Sim. & St. 237 ("I give to my cousin T. K. £50, whom I appoint joint executor"); *Compton* v. *Bloxham*, 2 Coll. 201 ("My brother C. my executor").

(*i*) *Wildes* v. *Davies*, 1 Sm. & G. 475; better reported in 22 L. J. Ch. 495. See *Re Appleton*, 29 Ch. D., at p. 896.

(*k*) The same learned V.-C., decided differently in *Slaney* v. *Watney*, L. R. 2 Eq. 418; but in that case further legacies were given in a subsequent part of the will to the persons named executors "as an additional acknowledgment" for their trouble.

(*l*) *Re Reeve's Trusts*, 4 Ch. D. 841.

(*m*) *Re Bunbury*, I. R. 10 Eq. 408.

(*n*) *Griffiths* v. *Pruen*, 11 Sim. 202; *Christian* v. *Devereux*, 12 Sim. 264, followed in *Re Maxwell*, [1906] 1 Ir. R. 386. See also *Parsons* v. *Saffery*, 9 Pri. 578. The question whether, under a gift of residue to executors, they take beneficially or as trustees for the next-of-kin, is discussed above, p. 1596.

that a gift to a person named executor is attached to the office does not arise where the gift is of residue, or of a share of residue. And the Vice-Chancellor said that there was no case which decided that an executor should be deprived of his right to a residue, or a share of a residue, given to him, because he did not prove the will (*o*).

Legacy to executor by name.

The presumption that a legacy given to a person who is appointed executor is annexed to the office, will not be rebutted by the mere fact that the legacy is given to him by name without describing him as executor, and that his appointment as executor occurs in a subsequent part of the will (*p*), or that the appointment is made by the will and the legacy is given by a codicil to the person so appointed, merely naming him (*q*).

Difference between legacies to executors.

It is not satisfactorily settled whether the fact that the bequests to several persons appointed executors differ in amount or subject-matter is enough of itself to rebut the presumption. The decision in *Cockerell* v. *Barber* (*r*) seems to have been partly influenced by this consideration. And in *Jewis* v. *Lawrence* (*s*), where a testator bequeathed a leasehold house to A, "one of my executors hereinafter named," and a pecuniary legacy to B, "one of my executors hereinafter named," it was held by James, V.-C., that the inequality in the gifts rebutted the presumption. But in *Re Appleton*, Cotton, L.J., said (*t*), that it must not be taken as a general rule "that a difference either in the nature or amount of legacies given to the persons named as executors is of itself sufficient to show that the gift is not attached to the office." This, however, is a question of construction in each case.

What is sufficient assumption of executorship to support claim to legacy.

The next question with regard to legacies to persons appointed executors is as to what will amount to a sufficient assumption of the character of an executor to entitle them to claim their legacies.

It is clear that if the legatee proves the will with a *bona fide* intention to act as executor, that will be sufficient to entitle him

(*o*) 12 Sim., at p. 269. But only a few years previously, in *Barber* v. *Barber*, 3 My. & Cr. 688, a case where a residue, consisting of proceeds of a mixed fund, was in the events which happened, given equally among four persons who were appointed executors, Lord Langdale, M.R., had held that one fourth share, in consequence of one of such persons having renounced probate, devolved upon the three other legatees as tenants in common. On appeal before Lord Cottenham, C., the question of the right of the renouncing executor to his share was not raised, but his Lordship reversed the decision of the M.R. as to the devolution of the share, holding that it lapsed and went to the next-of-kin. See *ante*, p. 414.

(*p*) *Piggott* v. *Green*, 6 Sim. 72; *Re Appleton*, 29 Ch. D. 893.

(*q*) *Stackpoole* v. *Howell*, 13 Ves. 417.

(*r*) 2 Russ. 585; *ante*, p. 1597.

(*s*) L. R. 8 Eq. 345.

(*t*) 29 Ch. D., at p. 896.

to his legacy, even though he should die before the business of administering the estate is completed (*u*). And he may prove at any time before the estate is fully administered (*v*). Proving the will is *prima facie* regarded as an acceptance of the trust (*w*).

Acting as executor.

It will also be a sufficient assumption of office if the legatee, though he does not prove the will, unequivocally shows by his conduct that he intends to perform his duty as executor. Thus, in *Harrison* v. *Rowley* (*x*), an executor, who died before probate, was held entitled to a legacy given to him as executor for his care and loss of time in the execution of the trusts reposed in him, by having concurred with the other executors in directions for the funeral and in paying certain expenses for that occasion. So also, in *Lewis* v. *Mathews* (*y*), an executor to whom a legacy was left for his trouble, being in Australia at the death of the testator, sent home a power of attorney under which another person administered the personal estate and received the rents of the real estate. The executor died without proving the will. It was held by Malins, V.-C., that the executor had sufficiently shown his intention to act as such so as to entitle his representatives to the legacy.

Incapacity to act.

But in order to entitle an executor-legatee to his legacy he must either prove or act under the will. He will not be entitled to the legacy, by its being shown that he was incapacitated from undertaking the office by age and infirmity (*z*), or illness (*a*), or by death before he had time to prove the will (*b*).

Probate fraudulently obtained.

And the mere fact of proving a will will not support an executor's claim to his legacy if it appears that he procured probate merely in order to claim the legacy and without any *bona fide* intention to act in the trusts of the will; *a fortiori* if in consequence of misconduct as executor he is restrained from interfering in the administration of the estate (*c*).

Cesser of annuity given to executor for his trouble.

Sometimes a testator gives an annuity to his executors or trustees for their trouble in administering his estate, and events may occur raising the question as to whether the annuity should cease to be payable. It may be stated, as a general rule, that it continues to be payable, although the trustees employ

(*u*) *Hollingsworth* v. *Grasett*, 15 Sim. 52; *Angermann* v. *Ford*, 29 Bea. 349.
(*v*) *Reed* v. *Devaynes*, 2 Cox, 285.
(*w*) *Mucklow* v. *Fuller*, Jac. 198.
(*x*) 4 Ves. 212.
(*y*) L. R. 8 Eq. 277.
(*z*) *Hanbury* v. *Spooner*, 5 Bea. 630.
(*a*) *Re Hawkin's Trusts*, 33 Bea. 570.
(*b*) *Griffiths* v. *Pruēn*, 11 Sim. 202.
(*c*) *Harford* v. *Browning*, 1 Cox, 302.

an agent to collect rents (*d*), or although a suit for the administration of the testator's estate may have been instituted, unless the trustees are thereby relieved of their duties (*e*). But if the annuity is expressly given for collecting the rents, and the trustees employ a collector, they are not entitled to the annuity in addition to the collector's salary (*f*).

Gifts to "relations," how construed.

VI.—Gifts to Relations.—Mr. Jarman continues (*g*): "The word *relations* taken in its widest extent embraces an almost illimitable range of objects; for it comprehends persons of every degree of consanguinity, however remote, and hence, unless some line were drawn, the effect would be, that every such gift would be void for uncertainty. In order to avoid this consequence, recourse is had to the Statutes of Distribution; and it has been long settled, that a bequest to relations applies to the person or persons who would, by virtue of those statutes, take the personal estate under an intestacy, either as next-of-kin, or by representation of next-of-kin (*h*).

Objects of a gift to relations determined by Statutes of Distribution.

As to real estate.

"It was formerly doubted whether this construction extended to devises of real estate, but the affirmative was decided in the case of *Doe* d. *Thwaites* v. *Over* (*i*), where a testator devised all his freehold estates to his wife for life, and, at her decease, to be equally divided *among the relations on his side*; and it was held, that the three first cousins of the testator, who were his next-of-kin at his death, were entitled. A counterclaim was made by the heir-at-law, who was the child of a deceased first cousin, and who contended, that the devise was void for uncertainty. One of the first cousins, who was the nearest paternal relation, also claimed the whole, as being designated by the words 'on my side'; but the Court was of opinion that those words did not exclude the maternal relations, they being as nearly related to the testator as the relations *ex parte paterna*.

"The rule which makes the Statutes of Distribution the guide in these cases, is not departed from on slight grounds. Thus, the exception out of a bequest to relations, of a nephew of the

(*d*) *Wilkinson* v. *Wilkinson*, 2 S. & St. 237.
(*e*) *Baker* v. *Martin*, 8 Sim. 25.
(*f*) *Re Muffett*, 55 L. T. 671; 56 L. T. 685.
(*g*) First ed., Vol. II, p. 45.
(*h*) 2 Ch. Rep. 77; Pre. Ch. 401; Gilb. Eq. Ca. 92; 1 Atk. 469; Ca. t. Talb. 251; 2 Eq. Ab. 368, pl. 13; Dick. 50, 380; Amb. 70; 1 T. R. 435, n., 437, n.; 1 B. C. C. 31; 3 *ib.* 234; 4 *ib.* 207; 8 Ves. 38; 9 *ib.* 319; 16 *ib.* 27; *Walter* v. *Maunde*, 19 *ib.* 423; *Pope* v. *Whitcombe*, 3 Mer. 689; overruling *Jones* v. *Beale*, 2 Vern. 381. So "friends and relations," *Gower* v. *Mainwaring*, 2 Ves. sen. pp. 87, 110; *Re Caplin's Will*, 2 Dr. & Sm. 527. But as to powers of selection in favour of relations, *vide ante*, p. 796, *post*, p. 1607. The exclusion of "relatives" from all benefits under a will does not prevent relatives from taking undisposed-of property of the testator as his statutory next-of kin: *Re Holmes*, 62 L. T. 383; *ante*, p. 682.
(*i*) 1 Taunt. 263.

testator (who was the son of a living sister), was not considered a valid ground for holding the gift to include other persons in the same degree of relationship, and thereby let in the children of a living sister, to claim concurrently with their parent, and other surviving brothers, sisters, and the children of a deceased brother, of the testator " (*j*).

On the other hand, in *Greenwood* v. *Greenwood* (*k*), where a testatrix gave the residue " to be divided between her relations, that is, the Greenwoods, the Everits, and the Dows " : the testatrix had herself explained her meaning, and, therefore, the Everits, although not within the degree of relationship limited by the statute, were held to take jointly with the Greenwoods and Dows, who were.

To " relation " in the singular.

Mr. Jarman adds (*l*) : " There is, it seems, no difference in effect between a gift to relations in the plural, and *relation* in the singular; the former would apply to a single individual, and the latter to any larger number; the term *relation* being regarded as *nomen collectivum*. And this construction obtained in one case (*m*) where the expression was ' my *nearest* relation of the name of the Pyots.' "

" Relatives."

The expressions " blood relations " and " relatives " have the same meaning as " relations " (*n*).

" Next of blood."

In a deed, a limitation of land to the " next of blood," or " nearest of blood," of A would, it seems, enure in favour of the individual answering that description according to the rules of descent; thus, supposing there were two brothers, A and B, and B died, leaving two sons, C and D, and C died, leaving issue, and land were limited to A for life, remainder to his next of blood in fee, here D would take the remainder, although he would not be the heir-at-law (*o*). It seems that a similar construction would be placed on a devise. But, if there are two or more of equal degree (as would be the case in the preceding example if D had a younger brother), the question whether they all take equally, or whether the eldest takes, seems to be a matter of some doubt (*p*).

Whether " relations " take *per stirpes* or *per capita*.

Mr. Jarman was of opinion that a gift to relations ought to fall within the same rule as a gift to statutory next-of-kin, so

(*j*) *Rayner* v. *Mowbray*, 3 B. C. C. 234.

(*k*) 1 B. C. C. 33, n. See *Stamp* v. *Cooke*, 1 Cox, 234, stated *post*, p. 1605; *Griffith* v. *Jones*, 2 Freem. 96.

(*l*) First ed., Vol. II, p. 46.

(*m*) *Pyot* v. *Pyot*, 1 Ves. sen. 335; and see *per* Lord Loughborough, *Marsh* v. *Marsh*, 1 B. C. C., at p. 294.

(*n*) *Salusbury* v. *Denton*, 3 K. & J. 529; *Re Patterson*, [1899] 1 Ir. R. 324; *Re Lanyon*, [1927] 2 Ch. 264.

(*o*) Co. Litt. 10 b.

(*p*) *Periman* v. *Pierce*, Palm. 303; Co. Litt. 10 b., note (2). See *Power* v. *Quealy*, 2 L. R. Ir. 227, 4 L. R. Ir. 20, where the devise was " to the nearest and most deserving male cousin and a regular Power of the family."

far as regards the manner in which they take, and he stated the law thus (*q*): "The Statute of Distributions not only determines the objects of a gift to relations, but also regulates the proportions in which they take, the gift being held to apply to the next-of-kin, and the persons whom the Statute admits by representation, the whole taking *per stirpes*, not *per capita*; that is, the property is distributed proportionably among the stocks, not equally among the several individual objects of every degree." On principle, Mr. Jarman's view is, it is submitted, correct, for though the rule limiting the class of persons entitled under a gift to relations is founded on the inconvenience of a wider interpretation, still it is a rule of construction (*r*) and as such supposes the testator to have had the statute in his contemplation. But authority, though not perfectly distinct, inclines to an opposite view. Thus in *Tiffin* v. *Longman* (*s*), where a testator gave personalty to his daughter for life, and if she died without issue (which happened) he directed that advertisements should be published for the information of his relations, and gave the property to such of them as should make their claim within two months after such advertisements, to be divided among them according to the discretion of his executors (who died without exercising it); it was held by Romilly, M.R., that the class was to be ascertained at the death of the daughter, that it consisted of those who would have been the testator's statutory next-of-kin if he had then died intestate, and that the property must be divided between the class equally, *per capita*.

Tiffin v. *Longman*.

From the express direction to divide *per capita* it is to be inferred that the facts of the case (which in this respect are not given) actually called for a decision of the material question whether distribution should or should not be according to the statute, *i.e.*, *per stirpes*. It is observable, however, that the objects of gift were what has been called an artificial class created by the testator and to be ascertained at a time other than the death of the propositus—a circumstance which, even where the gift is to "next-of-kin" with an express reference to the statute, is considered to deprive the reference of much of its force beyond ascertaining the persons who are to take (*t*).

(*q*) See the Author's note to 1 Pow. Dev. 290, maintaining this view, chiefly on the authority of *Pope* v. *Whitcombe*, 3 Mer. 689: it afterwards appeared that the report of that case was inaccurate, and that the facts of it did not raise the question, Sug. Pow. 8th ed. 660. However, the Author restated his former view, though without reference to any authority, in the words above quoted, 1st ed. of this work, Vol. II, p. 46. And see *per* Kindersley, V.-C., 2 Sim (N.S.) pp. 111, 112.

(*r*) 1 Gilb. Eq. Ca. 92; 1 Br. C. C. 33.

(*s*) 15 Bea. 275.

(*t*) See *per* Selwyn, L.J., L. R. 4 Ch., at p. 303; *per* Lord Cairns, 4 A. C., at p. 451.

Eagles v. *Le Breton.*

Again in *Eagles* v. *Le Breton* (*u*), where a testatrix gave all her property to her sisters A and B, and by codicil directed that at their death it should "pass to my relatives in America." Her relations in America at her death consisted of thirteen persons, all being her first cousins. One of them died before B (who survived the testatrix). It was held by the same Judge that the thirteen cousins were entitled, and that they took, not as tenants in common, as they would have taken under the statute, but as joint tenants. He said it was settled that under a gift of this description the class was to be ascertained at the testator's death (*x*); also that "relations" meant the persons who would take under the statute; that it was true that where there was an express reference to the statute they would take as tenants in common in the shares in which they would have taken on an intestacy. But that when there was no express reference to the statute the case was different. There was nothing then to prevent the ordinary rule from applying, that under a gift to a class without words of severance all the members of the class took as joint tenants.

Here again the class was an artificial one, being limited to those in America, and excluding the surviving sister (*y*). This limit happened to be the same as (putting the sister aside) was imposed by the statute. But the statute was not thereby prevented from applying; for the circumstances might have been different at the death of the testatrix, and a gift to relations in a particular country might often be as indefinite as a gift to relations *simpliciter*. In denying to any but an express reference to the statute the effect of importing the statutory mode of distribution, the M.R. probably intended to speak only of a case where (as here) the term used was "relations," and not to deny the sufficiency of an implied reference in a case where the terms used were "next-of-kin" or "heirs," which would have been to contradict a previously expressed opinion (*z*) and a previous decision (*a*) of his own.

Effect of words directing an equal distribution.

"If, however," says Mr. Jarman (*b*), "the testator has

(*u*) 42 L. J. Ch. 362; also reported, but less fully and with some variations, L. R. 15 Eq. 148 (where "tenant for life" in the judgment is an erratum for "testatrix").

(*x*) As to this see below.

(*y*) The cousins not being properly next-of-kin, would they have been entitled if the gift had been to "*next-of-kin* in America"? See *Doe* v. *Plumptre*, *ante*, p. 1582. In *Smith* v. *Campbell*, 19 Ves. 400, upon a gift to "*nearest* relations in Ireland," Grant, M.R., held the words "in Ireland" to be *demonstratio* merely, not *limitatio*. [This note, and the remarks in the text on *Tiffin* v. *Longman* and *Eagles* v. *Le Breton*, are taken verbatim from the 4th ed. of this work, by Mr. Vincent, Vol. II, p. 122 *seq.*]

(*z*) In *Lucas* v. *Brandreth*, 28 Bea. 278.

(*a*) In *Lucas* v. *Jacobs*, 16 Bea. 557, *ante*, p. 1541.

(*b*) First ed., Vol. II. p. 47.

introduced into the gift expressions pointing at equality of participation, of course the statutory mode of distribution is excluded, and all the objects of every degree are entitled in equal shares" (*c*).

Where the gift contains words indicating that the objects are to take in manner directed by the statute, and adds that they shall take equally, or "share and share alike," it might be supposed that the testator meant that the objects should be ascertained by reference to the statute, and when so ascertained should take equally. However, in *Fielden* v. *Ashworth* (*d*), Malins, V.-C., rejected the words "share and share alike" and held that the next-of-kin took *per stirpes*.

In *Re Richards* (*e*) the words "for and equally between the person or persons who at my death shall be my next-of-kin according to the statutes for the distribution of the estates of intestates" were held to mean that the statutory next-of-kin should take *per capita* and that the statutes were only referred to for the purpose of defining the class.

"Near" and "nearest" relations.

The objects of a gift to "relations" are not varied by its being associated with the word "near" (*f*). But where the gift is to the "nearest relations," the next-of-kin will take (*g*), to the exclusion of those who, under the statute, would have been entitled by representation. Thus, surviving brothers and sisters would exclude the children of deceased brothers and sisters (*h*), or a living child or grandchild, the issue of a deceased child or grandchild (*i*). Where, however, the testator added to a devise to nearest relations, the words "as sisters, nephews, and nieces," Sir Ll. Kenyon, M.R., directed a distribution according to the statute; and they were held to take *per stirpes*, though it was contended that all the relations specified should take *per capita*, including the children of a living sister. His Honor, however, thought that the testator had a distribution according to the statute in his view; at all events, that the contrary was not

Nearest relations, "as sisters, nephews, and nieces."

(*c*) *Thomas* v. *Hole*, Cas. t. Talb. 251; *Green* v. *Howard*, 1 B. C. C. 31; *Rayner* v. *Mowbray*, 3 *ib.* 234; *Butler* v. *Stratton*, *ib.* 367.

(*d*) L. R. 20 Eq. 410. Compare *Holloway* v. *Radcliffe*, 23 Bea. 163, *ante*, p. 1586; *Low* v. *Smith*, 25 L. J. Ch. 503, *ante*, p. 1542.

(*e*) [1910] 2 Ch. 74.

(*f*) *Whithorne* v. *Harris*, 2 Ves. sen. 527, see also 19 Ves. 403.

(*g*) *Re Nash*, 71 L. T. 5.

(*h*) *Pyot* v. *Pyot*, 1 Ves. sen. 335; *Marsh* v. *Marsh*, 1 B. C. C. 293; *Smith* v. *Campbell*, 19 Ves. 400, Coop. 275. But see *Edge* v. *Salisbury*, Amb. 70, and *Goodinge* v. *Goodinge*, 1 Ves. 231.

(*i*) It is suggested by Messrs. Wolstenholme and Vincent, in the third edition of this work (Vol. II, p. 111), that, "upon the same principle, all who stand in the same degree must take under the will, though only some of them would have been entitled under the statute," in support of which proposition they refer to *Withy* v. *Mangles*, 4 Bea. 358, 10 Cl. & Fin. 215, *ante*, p. 1578.

CHAPTER XLI.

sufficiently clear to induce him to depart from the common rule. The children of the living sister, therefore, were excluded (*k*).

Relations of the half-blood.

Mr. Jarman continues: "As relations by the half-blood are within the statute, so they are comprehended in gifts to next-of-kin and to relations; and a bequest to the next-of-kin of A 'of her own blood and family as if she had died sole, unmarried, and intestate,' has received the same construction" (*l*).

Illegitimate relations.

In accordance with the general rule, a gift to "relations" *prima facie* means legitimate relations, but a gift to the relations of a person who is to the knowledge of the testator a bastard and childless, may be construed to mean those persons who would have been his relations if he had been legitimate (*m*). Again, a testator may be his own dictionary; that is, he may by his language show that he uses the term "relations" as including illegitimate relations. Thus in *Seale-Hayne* v. *Jodrell* (*n*), a testator in one part of his will referred to certain persons who were not legitimately related to him as "my cousins," and gave his residue to "my relatives hereinbefore named"; it was held that his illegitimate relations were included in the gift.

Relations by affinity.

Mr. Jarman continues (*o*): "A gift to next-of-kin or relations, of course, does not extend to relations by affinity (*p*), unless the testator has subjoined to the gift expressions declaratory of an intention to include them. Such, obviously, is the effect of a bequest expressly to relations 'by blood or marriage,' which lets in all persons married to relations (*q*).

Husband or wife.

"It is clear that a gift to next-of-kin or relations does not include a husband (*r*) or wife (*s*); and such has been also the adjudged construction of a bequest to 'my next-of-kin, *as if I had died intestate*' (*t*); the latter words being considered not

(*k*) *Stamp* v. *Cooke*, 1 Cox, 234.

(*l*) 1st ed., Vol. II, p. 48; *Cotton* v. *Scarancke*, 1 Mad. 45. No doubt the construction might be excluded by the context of the will: *Re Reed*, 36 W. R. 682.

(*m*) *Re Deakin*, [1894] 3 Ch. 565. Compare the cases of gifts to next-of-kin, *ante*, p. 1585.

(*n*) [1891] A. C. 304, *post*, p. 1758.

(*o*) First ed., Vol. II, p. 49.

(*p*) *Maitland* v. *Adair*, 3 Ves. 231; *Harvey* v. *Harvey*, 5 Bea. 134. See *Craik* v. *Lamb*, 1 Coll. pp. 489, 494.

(*q*) *Devisme* v. *Mellish*, 5 Ves. 529. As to what will or what will not suffice to include particular relations by affinity, see *post*, pp. 1608 *seq.*

(*r*) *Watt* v. *Watt*, 3 Ves. 244; *Anderson* v. *Dawson*, 15 *ib.* 532; *Bailey* v. *Wright*, 18 *ib.* 49, 1 Sw. 39. These were all cases of limitations to next-of-kin in settlements.

(*s*) *Nichols* v. *Savage*, cit. 18 Ves. p. 53 (bequest to next-of-kin).

(*t*) *Garrick* v. *Lord Camden*, 14 Ves. 372. In *Davies* v. *Baily*, 1 Ves. sen. 84, the gift was to the testator's relations, according to the Statute of Distribution: *Worseley* v. *Johnson*, 3 Atk. 758.

to indicate an intention to give to the persons entitled under the statute at all events; *i.e.* whether next-of-kin or not."

Power to appoint to relations.

It is explained elsewhere (*u*) that where a person has an exclusive power of appointing among relations, he may select persons who, although relations, are not the statutory next-of-kin, being more distantly related to the *propositus*. If, however, the donee of such a power fails to exercise it, and a gift is consequently implied in favour of the objects of the power (*x*), the persons who take are the statutory next-of-kin (*y*).

In *Re Patterson* (*z*), there was a power of appointment among the blood relations of the testator without any gift in default of appointment; no valid appointment having been made, it was held that the statutory next-of-kin took *per capita*, and that as the power was a distributive one they took as tenants in common.

Gifts "to poor relations," how construed.

Mr. Jarman continues (*a*): "A difficulty in construing the word *relations* sometimes arises from the testator having superadded a qualification of an indefinite nature; as where the gift is to the *most deserving* of his relations; or to his *poor or necessitous* relations. In the former case, the addition is disregarded, as being too uncertain (*b*); and the better opinion, according to the authorities is, that the word *poor* also is inoperative to vary the construction, though the cases are somewhat conflicting (*c*). In an early case (*d*) it was said that the word 'poor' was frequently used as a term of endearment and compassion; as one often says, 'my poor father,' etc.; and accordingly a countess (but who it seems had not an estate equal to her rank,) was held to be entitled under such a bequest. In *Widmore* v. *Woodroffe* (*e*), a testator bequeathed two-thirds of his property *to the most necessitous of his relations* by his father's and mother's side; [the testator left a niece his sole next-of-kin according to the statute, and more remote relations; and it was argued for the latter that in consequence of the use of the word 'necessitous' the gift ought not to be confined to those who were within the statute; but Lord Camden said several cases have been cited, all

(*u*) Chap. XXIII, *ante*, p. 796.
(*x*) *Ante*, p. 628.
(*y*) *Cole* v. *Wade*, 16 Ves. 27; *Salusbury* v. *Denton*, 3 K. & J. 529. As to the period for ascertaining the class, see *post*, p. 1621.
(*z*) [1899] 1 Ir. R. 324.
(*a*) First ed., Vol. II, p. 49.
(*b*) *Doyley* v. *Att.-Gen.*, 4 Vin. Abr. 485, pl. 16, 2 Eq. Ca. Abr. 194, pl. 15.
(*c*) *Widmore* v. *Woodroffe*, Amb. 636.
(*d*) *Anon.*, 1 P. W. 327. [As the reporter justly remarks "this seems to have been a strained interpretation in favour of the Earl and Countess of Winchelsea," and would probably not be adopted at the present day. C. Sweet.]
(*e*) Amb. 636.

making the statute the rule, to prevent an inquiry which would be infinite, and would extend to relations *ad infinitum*. The Court cannot stop at any other time.] And Lord Camden said the bequest would stand upon the word relations alone, *the word poor being added made no difference*; there was no distinguishing between the degrees of poverty. This decision may be considered to have overruled the earlier cases of *Jones* v. *Beale* (*f*) and *Att.-Gen.* v. *Buckland* (*g*), in each of which a gift to *poor relations* was extended to necessitous relations *beyond* the Statutes of Distribution."

But it is by no means clear that the decision in *Widmore* v. *Woodroffe* justifies the conclusion which Mr. Jarman draws from it. In that case there was only one relation within the statute, and consequently the only point decided was that the addition of the word "necessitous" did not make the word "relations" include those beyond the statute: the case is no authority for the proposition that if there are several statutory next-of-kin, a gift to "poor relations" will necessarily include those of them who are in affluent circumstances. On the other hand, *Brunsden* v. *Woolredge* (*h*) is an authority to the contrary; in that case B. by will dated 1734 bequeathed £500 on a certain event, to be distributed among his mother's poor relations. Also W. (the brother of B.) by will dated 1757 devised real estates to A. and his heirs, in trust to sell to pay debts, and pay the overplus to such of his mother's *poor relations*, as A., his heirs, etc., should think objects of charity; Sir T. Sewell, M.R., held that the gift was confined to those who were within the statute; and that the true construction of both wills was, "such of my mother's relations as are poor and proper objects." He said the difference was, that the latter gave a discretionary power to the executor, and the former did not (*i*).

Gift to poor relations regarded as charity.

The cases in which gifts to poor relations have been held to create charitable trusts have been already discussed (*k*).

VII.—Gifts to special classes of Relations.—In the construction of wills, the class of relations with regard to which questions most frequently arise is that of children, and this subject is accordingly reserved for a separate chapter. The general principle there stated, namely, that the legal construction of the

(*f*) 2 Vern. 381.

(*g*) Cited 1 Ves. sen. 231. [An explanation of the *ratio decidendi* in this case is suggested *ante*, p. 209. C. Sweet.]

(*h*) Amb. 507. The case is also discussed *ante*, p. 209, n. (*h*).

(*i*) See also a valuable note in Lewin on Trusts (8th ed., p. 836), where a dictum of Lord Thurlow in *Green* v. *Howard*, 1 B. C. C., at p. 33, and the decision in *Gower* v. *Mainwaring*, 2 Ves. sen. 87, are cited on this point.

(*k*) *Ante*, p. 209.

word "children" accords with its popular signification, applies also, *mutatis mutandis*, to gifts to other classes of relations, as nephews, nieces, cousins, etc. Thus great-nephews and great-nieces are not included in a gift to "nephews and nieces" (*l*), nor a great grand-nephew in a gift to "grand-nephews" (*m*). So descendants of first cousins will not take under a gift to "first cousins or cousins german" (*n*); nor a first cousin once removed under a gift to second cousins (*o*). And "cousins" *prima facie* means first cousins (*p*). "Uterine brothers and sisters" means brothers and sisters by the same mother but by a different father (*q*). "Half-cousins" means cousins once removed and second cousins (*r*). Again, relations by affinity do not, without the aid of a context (*s*), take under gift to "relations" generally (*t*), or to relations of a particular denomination, as nephews and nieces (*u*). And a gift to nephews or nieces will not include all great-nephews or great-nieces (*v*), or all nephews or nieces by marriage (*x*), merely because in another part of the will the testator has misdescribed one or more of them as a nephew or niece. Generally, indeed, it will not include even individuals thus misdescribed (*y*).

"Nephews," "first cousins," etc., do not include great nephews or second cousins.

"Cousins" means first cousins.

Uterine brother.

Half-cousins.

But the intention of a testator to use any of these appellations in a less accurate sense will of course prevail, if clearly indicated by the context. Thus, in *James* v. *Smith* (*z*), where a testator

Unless the context proves a different intention;

(*l*) *Shelley* v. *Bryer*, Jac. 207; *Falkner* v. *Butler*, Amb. 514.

(*m*) *Waring* v. *Lee*, 8 Bea. 247.

(*n*) *Sanderson* v. *Bayley*, 4 My. & C. 56.

(*o*) *Corporation of Bridgnorth* v. *Collins*, 15 Sim. 538; *Re Parker*, 15 Ch. D. 528, 17 Ch. D. 262.

(*p*) *Stoddart* v. *Nelson*, 6 D. M. & G. 68; *Stevenson* v. *Abingdon*, 31 Bea. 305; overruling contrary dictum of Shadwell, V.-C., *Caldecott* v. *Harrison*, 9 Sim. 457; *Copland's Executors* v. *Milne*, [1908] Ct. of Sess. Ca. 426; *Burbey* v. *Burbey*, 9 Jur. (N.S.) 96.

(*q*) *Re Vincent*, 70 Sol. J. 1220.

(*r*) *Re Chester*, [1914] 2 Ch. 580; some evidence of local usage was admitted, but the Judge did not adopt it.

(*s*) *Vide ante*, p. 1606. In *Frogley* v. *Phillips*, 3 D. F. & J. 466, a bequest to the testator's nephews and nieces "on both sides" was held to include his wife's nephews and nieces.

(*t*) *Hibbert* v. *Hibbert*, L. R. 15 Eq. 372.

(*u*) *Wells* v. *Wells*, L. R. 18 Eq. 504; *Grant* v. *Grant*, L. R. 5 C. P. pp. 380, 727, 2 P. & D. 8, *contra*, is opposed to the general current of authority.

(*v*) *Shelley* v. *Bryer*, Jac. 207; *Thompson* v. *Robinson*, 27 Bea. 486. See also *Re Blower's Trusts*, L. R. 6 Ch. 351, reversing *S.C.*, L. R. 11 Eq. 97; *Re Standley's Estate*, L. R. 5 Eq. 303; *Williamson* v. *Moore*, 10 W. R. 536.

(*x*) *Smith* v. *Lidiard*, 3 K. & J. 252; *Wells* v. *Wells*, L. R. 18 Eq. 504; *Re Green*, [1914] 1 Ch. 134; *Re Winn*, 115 L. T. 698.

(*y*) See cases in last two notes, and *Hibbert* v. *Hibbert*, L. R. 15 Eq. 372. See also *Merrill* v. *Morton*, 17 Ch. D. 382. In *Re Cozens*, [1903] 1 Ch. 138, the testatrix referred in one part of her will to a nephew of her husband as "my nephew" and a great-niece as "my niece"; it was held that they were not included in a gift to "my own nephews and nieces." In *Re Gue*, 61 L. J. Ch. 510, persons erroneously described in another part of the will as nephews and nieces were included by reference in the residuary gift. In *In b. Ashton*, [1892] P. 83, extrinsic evidence was admitted.

(*z*) 14 Sim. 214.

after describing a great-niece as his "niece A, daughter of his nephew B" bequeathed his residue to his nephews and nieces, Shadwell, V.-C., held that the testator had unequivocally shown that he meant the child of a nephew or niece to take, as well as a nephew or a niece, and that not only A but all others in the same degree were entitled to share. He distinguished *Shelley* v. *Bryer*: "There the testator spoke of a person as his niece who in fact was his great-niece, but he did not show that he knew her to be the child of a nephew or niece; he spoke at random." It may be doubted, however, whether the Judges who decided *Smith* v. *Lidiard* and *Thompson* v. *Robinson* would accept inadvertence as a sufficient distinction between those cases and *James* v. *Smith*. Again, in *Weeds* v. *Bristow* (*a*), where by his will a testator bequeathed his residue equally amongst his nephews and nieces; and by codicil he gave to his "nephew A" (who was in fact a great nephew), £100, which he declared was to be in addition to the share of residue given to him by the will—(thus far like *Shelley* v. *Bryer*)—and that he was to receive first the £100, and afterwards, in addition thereto, the said share of residue; it was held by Stuart, V.-C., that the testator had put his own construction on his language, and that not only A, but all other great-nephews and great-nieces were let in. As to A, the concluding passage of the codicil constituted of itself a gift to A; for of course a gift to an individual otherwise sufficiently described is not invalidated by a misstatement of his relationship (*b*); but as to the others, the case goes beyond *James* v. *Smith*; for there the testator used the word "niece" of "the daughter of a nephew"; here he used it only of "A."

—or the gift strictly construed would not have an object.

So if at the date of the will there is not, and it is impossible there ever should be, a nephew or niece, properly so called, and the testator knows the fact, the nephew or niece of a husband (*c*) or wife (*d*) may be entitled. So if the gift be to "nephews and nieces" (in the plural), and there is not and cannot be more than one nephew and one niece, nephews and nieces by marriage may take (*e*). And under corresponding circumstances first cousins once removed may take under a gift to "second cousins" (*f*). Where the gift is to the relations of

(*a*) L. R. 2 Eq. 333.
(*b*) *Stringer* v. *Gardiner*, 4 De G. & J. 468.
(*c*) *Sherratt* v. *Mountford*, L. R. 8 Ch. 928.
(*d*) *Hogg* v. *Cook*, 32 Bea. 641; *Sherratt* v. *Mountford*, L. R. 8 Ch. 928.
(*e*) *Adney* v. *Greatrex*, 38 L. J. Ch. 414. It was assumed that a woman aged 60 was past child-bearing. In *Crook* v. *Whitley*, 7 D. M. & G. 490, there was no evidence that the testatrix was aware of the state of the family.
(*f*) *Slade* v. *Fooks*, 9 Sim. 386; *Mayott* v. *Mayott*, 2 Br. C. C. 125 (Belt's note); *Re Bonner*, 19 Ch. D. 201; *Wilks* v. *Bannister*, 30 Ch. D. 512. If, however, there are persons who strictly answer the description of second

a person other than the testator, it will not be presumed that the testator knew the exact state of the family; it must be proved that he knew it (*g*).

Uncertainty.

If there is a gift to nephews and nieces, and it is clear from the facts that the testator did not mean nephews and nieces, and it is impossible to enable the Court to ascertain whom he did mean, the gift is void for uncertainty (*h*).

Where testator provides his own dictionary.

The difficulty in most of these cases arises from the fact that the testator has in one part of his will used a word importing relationship in an inaccurate sense, from which it may be argued that he uses the word in that sense throughout the will. The tendency of the Courts has hitherto been towards a strict construction; consequently if the testator gives legacies to persons who are nieces of his wife, describing them as "my nieces," and gives his residue to "my nephews and nieces," only his nephews and nieces by blood are entitled to share in the residue (*i*). But if the testator has no nephews or nieces in the primary sense of the word, the door is open to admit the nephews and nieces of his wife (*k*). Some Judges indeed seem to think that the strict rule of construction laid down in the earlier cases has been modified by the decision in *Seale-Hayne* v. *Jodrell* (*l*). In that case a testator made dispositions in favour of certain named persons some of whom he described as his cousins and others as his nieces, and he gave his residue to "my relatives hereinbefore named": the persons described as the testator's nieces were his wife's nieces, and some of the persons described as his cousins were illegitimate relatives: it was held that "the relatives hereinbefore named" included relatives by affinity and illegitimate relatives. The principle is of general application (*m*), and it seems to follow, as a *prima facie* rule of construction, that if a testator uses such a word as "nephew" or "cousin" in one part of his will in a secondary or inaccurate sense, the probability is that he uses it in that sense throughout his will (*n*), but this construction can of course be excluded by the context.

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cousins evidence is not admissible that the testator was accustomed to call his first cousins once removed "second cousins": *per* Cotton, L.J., in *Re Parker*, 17 Ch. D., at p. 265.

(*g*) *Crook* v. *Whitley*, 7 D. M. & G. 490.

(*h*) *McHugh* v. *McHugh*, [1908] 1 Ir. R. 155.

(*i*) *Smith* v. *Lidiard*, 3 K. & J. 252; *Wells* v. *Wells*, L. R. 18 Eq. 504; *Merrill* v. *Morton*, 17 Ch. D. 382.

(*k*) *Sherratt* v. *Mountford*, L. R. 8 Ch. 928.

(*l*) [1891] A. C. 304, affirming C. A. in *Re Jodrell*, 44 Ch. D. 590.

(*m*) See *Re Wood*, [1902] 2 Ch. 542; *Re Smilter*, [1903] 1 Ch. 198; *Re Kiddle*, 92 L. T. 724. Compare also *In b. Ashton*, [1892] P. 83, and the other cases cited *ante*, pp. 492 *seq.*, with reference to questions of latent ambiguity.

(*n*) Kekewich, J., acted on this principle in *Re Parker*, [1897] 2 Ch. 208. See also *Re Gue*, [1892] W. N. 132, 61 L. J. Ch. 510, where the testator referred to S., a nephew of his wife, and S.'s wife, as "my nephew and niece."

There is in truth no hard-and-fast rule, and each case depends on the terms of the will and the facts known to the testator (*o*). In *Re Helliwell* (*p*) and *Re Bleckley* (*q*) the context of the will was sufficient to show that illegitimate relations were included.

The larger construction may after all be excluded by the context; as in *Stevenson* v. *Abingdon* (*r*), where by will the bequest was to "my cousins living at my death and the children of my cousins then dead," and by codicil the testator excluded from the bequest the only four persons who then were or could ever become his "cousins," it was nevertheless held that the children of those cousins, *i.e.*, first cousins once removed, could not take, for the testator had by expressly mentioning children of deceased cousins provided for such first cousins once removed as he meant to include.

Full meaning curtailed.

Conversely, the full force of any term of relationship may be so limited by the context as to exclude some of those who would naturally be included in the class (*s*).

Gift to a mixed class of relations of different degrees.

In *Silcox* v. *Bell* (*t*) there was in effect a gift to the testator's first and second cousins and the representatives of first and second cousins : it was held by Leach, V.-C., that certain persons who were first cousins twice removed of the testator were entitled to share in the bequest, "because they were within the degrees of relationship mentioned in the will."

Lord Cottenham explained the decision in this and similar cases (*u*) thus : "In all those cases the gift was to all the testator's first *and* second cousins, and in all, first cousins once removed were held to be entitled, but not because they were first cousins, but because they were within the degree of second cousins" (*x*). According to this the decision turned on the gift being to a mixed class of relations of different degrees. It seems, however, that the decision in *Mayott* v. *Mayott* (*y*) really turned on the fact that the testator had no second cousins in the proper sense of the word, and consequently his second cousins in the popular sense of the word, namely first cousins once removed, were held to be included (*z*). In any case it is clear that the principle supposed to be laid down by the cases in question does

(*o*) *Per* Swinfen Eady, J., in *Re Cozens*, [1903] 1 Ch. 138, *ante*, p. 1609, note (*y*).

(*p*) [1916] 2 Ch. 580. (*q*) [1920] 1 Ch. 450. (*r*) 31 Bea. 305.

(*s*) *Caldecott* v. *Harrison*, 9 Sim. 457, where the V.-C. held that "cousins" was restricted by the context to first cousins. The principle is of course clear, though the V.-C.'s construction of "cousins" has not been followed, *supra*.

(*t*) 1 S. & S. 301.

(*u*) *Mayott* v. *Mayott*, as reported, 2 Br. C. C. 125; *Charge* v. *Goodyer*, 3 Russ. 140.

(*x*) *Sanderson* v. *Bayley*, 4 My. & Cr. 56.

(*y*) As stated in Mr. Belt's note.

(*z*) See *per* Jessel, M.R., in *Re Parker*, 15 Ch. D., at p. 531.

not apply where there is a gift to first cousins and a separate gift to second cousins (*a*).

"Eldest," etc.

The meaning of "eldest," "youngest," "next eldest," and similar expressions, is discussed in connection with gifts to children (*b*).

A gift to a class of relations includes those of the half-blood.

As a general rule, a gift to brothers and sisters extends to half-brothers and sisters (*c*), and a gift to nephews and nieces to the children of half-brothers and sisters (*d*): and so with regard to every other degree of relationship. But, of course, this construction may be excluded by clear words (*e*).

Gift to A B, described as a relation.

Sometimes a testator makes a gift to an individual whom he describes as his nephew, cousin, and the like, and there is no person of that name to whom the description exactly applies; or there may be two persons wholly or partially answering the description; cases of this kind have been already discussed (*f*).

Illegitimate relations.

A gift to "brothers," "nephews," "cousins," and other classes of relations is *prima facie* confined to persons who are legitimate relations, but this rule may be excluded by the context of the will and the facts in the particular case (*g*).

"Male nephews."

In *Lucas* v. *Cuddy* (*h*), the expression "male nephews" was held to mean sons of the testator's brothers, to the exclusion of sons of his sisters.

When class ascertained.

It seems clear that the rules which determine the period at which, in a gift to children, the class is to be ascertained, apply also to gifts to other classes of relations; for that which is held a wise rule with regard to one grade of relationship must also be so held with regard to another (*i*). Thus, a gift to A for life and after his death to his brothers, will include the brothers born during the life of A (*k*); and the same has been held with regard to nephews and nieces (*l*), and cousins (*m*).

(*a*) *Re Parker*, 17 Ch. D. 262 (C. A.). (*b*) *Post*, pp. 1717 *seq.*

(*c*) See *per* Lord Sterndale, M.R., in *Re Burnyeat*, [1923] 2 Ch., at p. 63.

(*d*) *Grieves* v. *Rawley*, 10 Ha. 63; *Re Hammersley*, 2 T. L. R. 459; *Re Cozens*, [1903] 1 Ch. 138.

(*e*) *Re Reed*, 57 L. J. Ch. 790; *Re Dowson*, [1909] W. N. 245.

(*f*) Chap. XXXV.

(*g*) *Seale-Hayne* v. *Jodrell*, [1891] A. C. 304, affirming C. A. in *Re Jodrell*, 44 Ch. D. 590; *Re Parker*, [1897] 2 Ch. 208; *Re Bryon*, 30 Ch. D. 110; *Re Brown*, 37 W. R. 472; *Re Corsellis*, [1906] 2 Ch. 316. Compare *In b. Ashton*, [1892] P. 83, and the other cases cited *ante*, p. 505, 506, and the cases on gifts to illegitimate children, *post*, Chap. XLIII, where the rules for ascertaining legitimacy are explained; these apply to nephews and other relations: *Re Andros*, 24 Ch. D. 637. (*h*) Ir. R. 10 Eq. 514.

(*i*) See *per* Turner, L.J., in *Baldwin* v. *Rogers*, 3 D. M. & G., at p. 656.

(*k*) *Devisme* v. *Mello*, 1 B. C. C. 537; *Doe d. Stewart* v. *Sheffield*, 13 East, 526. See also *Leake* v. *Robinson*, 2 Mer. 363. Mr. Jarman thought (1st ed., Vol. II, p. 78) that "the rule which makes a gift to children comprehend all who come into existence before the time of distribution, is peculiar to these favoured objects," and that it was only extended to brothers and sisters and nephews and nieces, because such a gift "is substantially a gift to children."

(*l*) *Balm* v. *Balm*, 3 Sim. 492. See also *Shuttleworth* v. *Greaves*, 4 My. & C. 35; *Cort* v. *Winder*, 1 Coll. 320; *Re Partington's Trust*, 3 Gif. 378.

(*m*) *Baldwin* v. *Rogers*, 3 D. M. & G. 649.

Where objects take *per capita*.

Under a gift to A and the brothers of B and the nephews of C, all take *per capita* (*n*).

Division *per stirpes*.

Where the gift is to a class of relations and their issue and a division *per stirpes* is expressly directed, questions sometimes arise as to the manner in which the stocks are to be ascertained. These questions have been already referred to, and the case of *Re Wilson* (*o*), where the gift was to cousins and their issue, has been stated (*p*).

Relations dead at date of will.

The general rule is well established that when a testator makes a simple gift to "my brothers" or "the nephews of A," or the like, he primarily means those who are living at the date of the will, and does not refer to those who are then dead. But if he goes on to provide for the children of a deceased brother it may appear that the gift was framed in this way in order to show how the property was to be divided, each brother, whether alive at the date of the will or not, being treated as a *stirps* (*q*). There is, however, a strong presumption against this; where there is a gift to "my brothers," followed by a clause of substitution or an independent gift in favour of the children of deceased brothers, this is *prima facie* taken to apply only to children of brothers living at the date of the will and dying before the period of distribution (*r*). The presumption may, of course, be rebutted by the context or by the state of facts at the date of the will (*s*).

Independently of the general rule, a provision for the children of deceased brothers or other relations may appear to be intended to apply only to the children of brothers, etc., who were living at the date of the will: as where the income of the property is directed to be paid to "my brothers" during their respective lives (*t*).

A gift to great-nieces "born previously" to the date of the will includes a great-niece *en ventre sa mère* at that time (*u*).

VIII.—At what Period Relations, Next-of-Kin, etc., are to

(*n*) *Amson* v. *Harris*, 19 Bea. 210; *Baker* v. *Baker*, 6 Ha. 269. Compare the rule in the case of gifts to children, and the exceptions to it, *post*, pp. 1687 *seq.*

(*o*) 24 Ch. D. 664.

(*p*) *Ante*, p. 1561.

(*q*) This happens where there is a direct gift to the primary and secondary classes (brothers and the children of deceased brothers) in one clause, as in *Tytherleigh* v. *Harbin*, 6 Sim. 329.

(*r*) See the authorities cited in Chap. XXXVI, *ante*, pp. 1308 *seq.*

(*s*) *Ib.*

(*t*) *Re Wood*, [1894] 3 Ch. 381, approving *Re Chinery*, 39 Ch. D. 614.

(*u*) *Re Salaman*, [1908] 1 Ch. 4.

When death of testator is the period.

be ascertained.—Mr. Jarman continues (*x*): "The question, however, which more than any other has been the subject of controversy in gifts to next-of-kin and relations, refers to the period at which the objects are to be ascertained; in other words, whether the person or persons who happen to answer the description at the testator's death, or those to whom it applies at a future period, are intended. Where a devise or bequest is simply to the testator's own next-of-kin, it necessarily applies to those who sustain the character at his death (*y*). It is equally clear that where a testator gives real or personal estate to A (a stranger) during his life, or for any other limited interest, and afterwards to his own next-of-kin, those who stand in that relation at the death of the testator will be entitled, whether living or not at the period of distribution (*z*); there being nothing in the mere circumstance of the gift to the next-of-kin being preceded by a life or other limited interest to vary the construction; the result in fact being the same as if the gift had been 'to my next-of-kin, *subject to a life interest in* A.' The death of A is the period, not when the objects are to be ascertained, but when the gift takes effect in possession (*a*).

Next-of-kin of deceased person,

"Where the gift is to the next-of-kin of a person then actually dead, or who happens to die before the testator, the entire property (at least, if there be no words severing the joint tenancy), vests in such of the objects as survive the testator" (*b*). The rule was thus stated in *Wharton* v. *Barker* (*c*): "According

Wharton v. *Barker*.

(*x*) First ed., Vol. II, p. 51.

(*y*) See *Re Winn*, [1910] 1 Ch., at p. 286.

(*z*) *Harrington* v. *Harte*, 1 Cox, 131. See also 3 B. C. C. 234; 4 *ib*. 207; 3 East, 278; Taml. 346; 4 Jur. (N.S.) 407.

(*a*) The general principle is laid down in *Bullock* v. *Downes*, 9 H. L. C. 1; and in *Lee* v. *Lee*, 1 Dr. & Sm. 85. It is not necessary that the gift should contain any reference to intestacy, or to the Statutes of Distribution: *Re Ford*, 72 L. T. 5. The rule applies to a mixed fund: *Cusack* v. *Rood*, 24 W. R. 391. The construction is the same if the gift is to the persons "who shall be my next-of-kin," or in similar terms: *Rayner* v. *Mowbray*, 3 Br. C. C. 234. "Mere words of futurity are insufficient": *per* Wood, V.-C., in *Wharton* v. *Barker*, 4 K. & J., at p. 489. But if the gift after the death of the tenant for life is to the persons "who shall then be my next-of-kin," other considerations arise: see *post*, pp. 1617 *seq*.

In *Wharton* v. *Barker*, 4 K. & J. 483, the gift (after previous life estates and failure of children) was of one half to the persons "who shall then be considered as my next-of-kin" according to the statute, and of the other half to the persons "who shall then be considered as the next-of-kin (by statute) of my deceased wife." It was held by Wood, V.-C., that both classes of next-of-kin were to be ascertained at the death of the surviving tenant for life, but the decision on the former half was influenced by the construction made as to the latter. In *Re Maher*, [1909] 1 Ir. R. 70, there was a gift to the testator's children, and if they died without issue, to "my next-of-kin"; it was held that the next-of-kin were to be ascertained at the testator's death.

(*b*) *Vaux* v. *Henderson*, 1 J. & W. 388, n.

(*c*) 4 K. & J., at p. 502, *per* Wood, V.-C. It is supported by *Re Philps' Will*, L. R. 7 Eq. 151, and *Re Rees*, 44 Ch. D., at p. 488.

to *Philps* v. *Evans* (*d*), a bequest to the next-of-kin of a person who is dead at the date of the will must, under ordinary circumstances, receive an interpretation analogous to that adopted in the case of a bequest to the testator's own next-of-kin as regards the period for ascertaining who are the persons intended; and if there be nothing in the context to make the words applicable to a class to be ascertained at any other time than that of the testator's death, those who at the testator's death are the next-of-kin of the deceased person named in the will would naturally be the persons to take."

Re Ham's Trust.

But the rule does not apply if the terms of the will impliedly require the next-of-kin to be ascertained at the death of the *propositus*. Thus, in *Re Ham's Trust* (*e*), a testator directed a sum of money to be "divided between and amongst the relations of his late wife in such manner, shares, and proportions as would have been the case if she had died possessed of the said sum a spinster and intestate"; the wife had left sixteen nephews and nieces, her statutory next-of-kin, five of whom died before the testator; and it was argued that this was a gift to a class, and that the whole vested in those who survived the testator. Kindersley, V.-C., agreed that it would have been so, if the gift had been simply to the wife's relations (*f*); but there was also a direction that they were to take in the manner, shares, and proportions prescribed by the statute: this they could only do by reading the will as a gift to all the relations of the wife living at her death as tenants in common; for if the survivors took the whole they would take in different shares from those prescribed by the statute (*g*). The shares of those who died before the testator therefore lapsed. So, in *Re Rees* (*h*), where there was a gift to the persons who would have been the statutory next-of-kin of the testatrix's deceased husband "had he died intestate and without leaving any widow him surviving," these words were held to take the case out of the general rule above stated.

—of person who survives testator.

Mr. Jarman continues (*i*): "If [the gift] be to the next-of-kin or relations of a person who outlives the testator, of course the description cannot apply to any individual or individuals at his (the testator's) decease, or at any other period during the

(*d*) 4 De G. & S. 188.
(*e*) 2 Sim. (N.S.) 106.
(*f*) See *Lee* v. *Pain*, 4 Hare, at p. 250, and other cases cited *post*, Chap. XLII, s. II.
(*g*) See *per* Hall, V.-C., *Sturge and the Great Western Ry. Co.*, 19 Ch. D., at p. 449.
(*h*) 44 Ch. D. 484.
(*i*) First ed., Vol. II, p. 52.

life of the person, whose next-of-kin are the objects of gift (*k*). The vesting must await his death, and will apply to those who first answer the description, without regard to the fact whether by the terms of the will the distribution is to take place then or at a subsequent period (*l*).

Testator's next-of-kin living at a future period.

"The rule of construction, which makes the death of the testator the period of ascertaining the next-of-kin, is adhered to, notwithstanding the terms of the will confine the gift to next-of-kin *living* at the period of distribution; for this merely adds another ingredient to the qualification of the objects, and makes no further change in the construction. Indeed, it rather affords an argument the other way. Thus, where (*m*) a testator directed personal estate, and the produce of real estate, to be laid out for accumulation for ten years, and then a certain part thereof divided among such of the next-of-kin and personal representatives of B., *as should be then living*, Lord Thurlow held, that the next-of-kin at the testator's death, *surviving the specified period*, were entitled; *for it was plain that the testator meant some class of persons, of whom it was doubtful whether they would live ten years*" (*n*).

Where tenant for life is next-of-kin.

Cases sometimes occur where there is a gift to A for life and then to the testator's next-of-kin, or to A for life and after his death to his children or appointees, with a gift over in default to the testator's next-of-kin. According to some of the older authorities, if in such a case A is one of the next-of-kin (*o*), or the sole next-of-kin, at the testator's death the gift will be considered as referring to the persons who are the testator's next-of-kin at A's death (*p*). But it is now settled that the improbability in such a case of the testator meaning to give a

(*k*) *Danvers* v. *Earl of Clarendon*, 1 Vern. 35. "There is no such character in law as the heir of a living person, or as his statutory next-of-kin": *per* Kay, J., *Re Parsons*, 45 Ch. D., at p. 63.

(*l*) *Cruwys* v. *Colman*, 9 Ves. 319; *Smith* v. *Palmer*, 7 Hare, 225; *Gundry* v. *Pinniger*, 14 Bea. 94; 1 D. M. & G. p. 502; *Walker* v. *Marquis of Camden*, 16 Sim. 329. As to *Booth* v. *Vicars*, 1 Coll. 6, and *Godkin* v. *Murphy*, 2 Y. & C. C. C. 351, see 1 D. M. & G., p. 504; 8 Hare, p. 307.

(*m*) *Spink* v. *Lewis*, 3 B. C. C. 355; *Bishop* v. *Cappel*, 1 De G. & S. 411. The contrary construction appears to have been assumed in *Destouches* v. *Walker*, 2 Ed. 261, where, however, the gift was to such of testatrix's *relations*, etc.—as to which *vide post*, p. 1620, n. (*e*).

(*n*) Quoted with approval by Lord Davey in *Re Nash*, 71 L. T. 5, at p. 7. *Re Winn*, [1910] 1 Ch. 278. See *Re Bulcock*, [1916] 2 Ch., at p. 501.

(*o*) A may of course be the widow and therefore one of the statutory next-of-kin: *Jenkins* v. *Gower*, 2 Coll. 537; *Starr* v. *Newberry*, 23 Bea. 436.

(*p*) *Briden* v. *Hewlett*, 2 My. & K. 90; *Miller* v. *Eaton*, Coop. 272; *Butler* v. *Bushnell*, 3 My. & K. 232. In each of these cases the decision turned to some extent on the wording of the particular will. See also *Clapton* v. *Bulmer*, 10 Sim. 426; 5 My. & Cr. 108; *Minter* v. *Wraith*, 13 Sim. 52, and the remarks of Wood, V.-C., in *Wharton* v. *Barker*, 4 K. & J., at p. 500.

contingent benefit to A as next-of-kin is not, taken by itself, of sufficient weight to prevent the application of the general rule of construction. Thus, in *Ware* v. *Rowland* (*q*), a testator gave a fund to his daughter (his only surviving child) for life and after her death to her children, and if she left no children, to his heirs-at-law, share and share alike; she died a spinster, and it was held that the fund belonged to her personal representatives, and not to the persons who were the testator's heir-at-law or next-of-kin at her death (*r*).

Question of intention.

In all these cases, however, it is a question of intention, and each case depends on the wording of the particular will. In *Jones* v. *Colbeck* (*s*), a testator gave the residue of his estate to the children of his daughter M., and until she should have children, or if she should survive them, then to the separate use of M. during her life; and after the decease of his said daughter and her children, in case they should all die under twenty-one, that the *residuum* should go and be distributed among his relations in a due course of administration. The daughter was the only next-of-kin at the testator's death. Grant, M.R., thought it was clear that the testator intended to speak of relations not at the time of his own death, but at that of his daughter or her issue under twenty-one. He deemed it impossible that the testator could mean that the relations who were to take in that event were the daughter herself, who the testator evidently thought would survive him, and to whom the expression "my relations" was, in the opinion of the M.R., quite inappropriate. In *Lees* v. *Massey* (*t*), which was a somewhat similar case, it was not necessary to decide the point, but Lord Campbell thought that the relations should be ascertained at the death of the daughter, and Turner, L.J., said that the ground on which the decision in *Jones* v. *Colbeck* rested was perfectly sound, namely, that the testator had sufficiently

(*q*) 2 Ph. 635.

(*r*) Other cases are *Baker* v. *Gibson*, 12 Bea. 101; *Murphy* v. *Donegan*, 3 Jo. & Lat. 534; *Bird* v. *Luckie*, 8 Hare, 301; *Re Barber's Will*, 1 Sm. & Gif. 118; *Gorbell* v. *Davison*, 18 Bea. 556; *Markham* v. *Ivatt*, 20 *ib*. 579; *Harrison* v. *Harrison*, 28 *ib*. 21; *Re Lang's Will*, 9 W. R. 589; *Michell* v. *Bridges*, 13 W. R. 200; *Elmsley* v. *Young*, 2 My. & K. 82, 780 (settlement); *Smith* v. *Smith*, 12 Sim. 317 (settlement); *Allen* v. *Thorp*, 7 Bea. 72 (settlement); *Holloway* v. *Holloway*, 5 Ves. 399; *Masters* v. *Hooper*, 4 B. C. C. 207; *Doe* d. *Garner* v. *Lawson*, 3 East, 278; *Lasbury* v. *Newport*, 9 Bea. 376; *Jenkins* v. *Gower*, 2 Coll. 537; *Wilkinson* v. *Garrett*, *ib*. 643; *Wilson* v. *Pilkington*, 11 Jur. 537 (settlement); *Holloway* v. *Radcliffe*, 23 Bea. 163; *Starr* v. *Newberry*, *ib*. 436; *Re Greenwood's Will*, 31 L. J. Ch. 119, the report of which 3 Gif. 390 is wrong, see R. L., A. 1861, fo. 2402; *Urquhart* v. *Urquhart*, 13 Sim. 613; *Seifferth* v. *Badham*, 9 Bea. 370; *Nicholson* v. *Wilson*, 14 Sim. 549; *Lee* v. *Lee*, 1 Dr. & Sm. 85; *Re Wilson*, [1907] 1 Ch. 450; [1907] 2 Ch. 572. In *Pearce* v. *Vincent*, 2 Kee. 230, the rule was applied to a devise of realty to the testator's next-of-kin.

(*s*) 8 Ves. 38.

(*t*) 3 D. F. & J. 113.

indicated his intention that the property should go to his next-of-kin on the death of his daughter: he seemed to think that it would be easier to establish this intention where the gift is to the next-of-kin simply than where it is to the statutory next-of-kin (*u*).

Rule not strictly applied to gifts to relations.

The distinction between gifts to "relations" and gifts to "next-of-kin," as regards the time when the legatees are to be ascertained, has been taken in other cases (*x*).

Where the devise is to the next-of-kin of a third person.

In the foregoing cases the bequests were to the testator's own next-of-kin. A similar rule prevails where the gift is to the next-of-kin of a third person preceded by an express devise to the individual who is such person's expectant next-of-kin. Thus, in *Stert* v. *Platel* (*y*), where lands were devised to R. H. for life, remainder to his sons successively in tail, remainder to A. D. H. for life, remainder to his sons in like manner, remainder to "such person bearing the name of H. as shall be the male relation nearest in blood to R. H." (*z*): it was held by the Court of Common Pleas, that A. D. H. being the nearest relation of R. H. at the time of the testator's death, had an immediately vested remainder under the ultimate limitation in the will. It will be observed that the same individual being the nearest relation of R. H. at his death and at the death of the testator, no person was concerned to raise the question at which of those two periods the remainder should be held to vest (*a*).

What expressions authorise a departure from the rule.

Bird v. *Wood.*

It remains to consider those cases in which, independently of the circumstance that the gift to next-of-kin is preceded by a gift to the individual who happens to answer that description at the death of the testator or other ancestor, the context has been held to show an intention to refer to some other persons than those who answer the description at that time. *Bird* v. *Wood* (*b*) is generally cited on this point, but it appears to be an instance rather of the exclusion by force of the context of the true next-of-kin in favour of more remote relations than of the postponement of the period at which the legatees should be ascertained.

(*u*) See also *Say* v. *Creed*, 5 Hare, 580; *Minter* v. *Wraith*, 13 Sim. 52; and *Cooper* v. *Denison*, 13 Sim. 290, where the fact that the tenant for life had a power of appointment affected the construction. Wood, V.-C., in *Wharton* v. *Barker* (4 K. & J., at p. 500), approved of the principle on which *Jones* v. *Colbeck* was decided, but he seemed to think that it had been practically overruled by *Ware* v. *Rowland*.

(*x*) *Tiffin* v. *Longman*, 15 Bea. 275; *Holloway* v. *Radcliffe*, 23 Bea. 163.

(*y*) 5 Bing. N. C. 434.

(*z*) These terms were considered equivalent to a bequest to next-of-kin, see *per* Bosanquet, J., 5 Bing. N. C., at p. 441.

(*a*) *Ante*, p. 1616.

(*b*) 2 S. & St. 400, corrected 2 My. & K., pp. 86, 89.

The bequest was to the testatrix's daughter for life, and after her death, as she should appoint, and in default of appointment, to her (the testatrix's) next-of-kin, to be considered as a vested interest from the testatrix's death, except as to any child afterwards born of her daughter. The daughter having died childless and without making any appointment, Leach, V.-C., held that by the exception the testatrix had shown what class she meant to designate as her next-of-kin, namely, her grandchildren; and they were to take vested interests at her (the testatrix's) death: the daughter was therefore excluded (*c*).

But the mere exception from a gift to the next-of-kin of persons who if the tenant for life were out of the way would, as matters stand at the date of the will, be included among the next-of-kin, is not sufficient reason for departing from the general rule: for this would be to assume that the testator expected the state of his family to remain the same at his death as at the date of the will, an assumption which we have already seen ought not to be made. It may very well be that the testator introduced the exception with this view, that if the tenant for life should die in his lifetime and his next-of-kin should consist of the class to which the excepted persons belonged, those persons should be excluded from the bequest, and if the matter is thus left in doubt the general rule prevails (*d*).

Effect of power of appointment.

Where there is an express gift in remainder to relations or next-of-kin, subject to a power of appointment in the legatee for life, the objects of the gift are, of course, to be ascertained without regard to the existence of the power, which, unless exercised, has no operation on the question. But where such a gift is implied from a testamentary power of appointment (that is, a power to appoint by will only), given to the tenant for life, then the death of the tenant for life is the period to be regarded, whether the power be one of selection (*e*), or only of

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(*c*) See also *Eagles* v. *Le Breton*, 42 L. J. Ch. 362, *ante*, p. 1604.

(*d*) *Lee* v. *Lee*, 1 Dr. & Sm. 85. Although the facts were found not to raise the point, Kindersley, V.-C., expressed a clear opinion upon it. Cf. *Re Crawhall's Trust*, 8 D. M. & G. 480 (gift to "children, except issue of A," who was a deceased child); *Cooper* v. *Denison*, 13 Sim. 290 ("other the next-of-kin").

(*e*) *Att.-Gen.* v. *Doyley*, 4 Vin. Abr. 485; *Harding* v. *Glyn*, 1 Atk. 469, cit. 5 Ves., p. 501; *Cruwys* v. *Colman*, 9 Ves. 319; *Cooper* v. *Denison*, 13 Sim. 290; *Re Susanni's Trusts*, 47 L. J. Ch. 65. In *Sinnott* v. *Walsh* (5 L. R. Ir. 27) the power was restricted to persons living at the date of the testator's will; see *ante*, p. 795. In *Carthew* v. *Enraght*, 20 W. R. 743, there was a power to select ten of the descendants of H.; at the death of the tenant for life there were only six descendants living; it was held that they took the legacy.

distribution (*f*). This principle, however, does not apply where the power may be exercised by any writing (*g*), or where there is no estate for life : in the latter case the distribution not being suspended, those who are to take in default of appointment are, it seems, those who answered the description of next-of-kin at the testator's death (*h*).

If there is a life estate given to some person other than the donee, it seems, on principle, that the death of the tenant for life is the period for ascertaining the class (*i*), even if the donee of the power survives the tenant for life (*k*). In *Birch* v. *Wade* (*l*), where property was (in effect) given to A for life and then to B for life, with a declaration that it should "be left entirely to the disposal of A among such of her relations as she may think proper after the death of" B, it was held that the class must be ascertained at the death of A. "The cases on 'relations' are very peculiar" (*m*).

Gift expressly to next-of-kin or relations at a future period.

It has been already pointed out that mere words of futurity are not sufficient to displace the general rule which makes the death of the testator the period for ascertaining relations and next-of-kin (*n*) : as in the case of a gift to A for life and afterwards "to those who shall be my next-of-kin" (*o*). But, as Mr. Jarman points out (*p*), "if property be given upon certain events to such persons as shall *then* be next-of-kin or relations of the testator, the persons standing in that relation at the period in question, whether so or not, at the death of the testator, are, upon the terms of the gift, entitled" (*q*).

(*f*) *Pope* v. *Whitcombe*, 3 Mer. 689, corrected Sug. Pow. 953 (8th ed.), *ante*, p. 630; *Finch* v. *Hollingsworth*, 21 Bea. 112; *Walsh* v. *Wallinger*, 2 R. & M. 78; *Re Caplin's Will*, 2 Dr. & S. 527; *Re Patterson*, [1899] 1 Ir. R. 324. See also *Re Swan*, [1911] 1 Ir. R. 405.

(*g*) *Ante*, p. 630, and *post*, p. 1680.

(*h*) Sugden on Powers, 662, citing *Cole* v. *Wade*, 16 Ves. 27; *Walter* v. *Maunde*, 19 Ves. 424. The point did not arise in the case, as Lord St. Leonards himself remarks.

(*i*) In *Re White's Trusts*, John. 656, where the power was to appoint among such of the testator's issue as A should think fit, Wood, V.-C., said : "In a case where the donee of the power survives the tenant for life, there would be a possible ground for arguing that the class must be kept in suspense long enough to let in all who might be born while the power was in existence." And see Farwell on Powers (3rd ed.), 538. But this argument equally applies to the ordinary case of a power to appoint by deed or will. See also *Att.-Gen.* v. *Doyley*, *supra*, and the remarks of Chitty, J., in *Wilson* v. *Duguid*, 24 Ch. D., at p. 244.

(*k*) *Carthew* v. *Enraght*, 20 W. R. 743.

(*l*) 3 V. & B. 198. See *Re Swan*, [1911] 1 Ir. R. 405.

(*m*) *Per* Chitty, J., in *Wilson* v. *Duguid*, *supra*. As to the doctrine of implication from powers of appointment, see *ante*, p. 628.

(*n*) *Ante*, p. 1615.

(*o*) *Per* Wood, V.-C., in *Wharton* v. *Barker*, 4 K. & J., at p. 489.

(*p*) First ed., Vol. II, p. 58.

(*q*) *Long* v. *Blackall*, 3 Ves. 486; *Boys* v. *Bradley*, 10 Hare, 389, stated *ante*, p. 1583; *Wharton* v. *Barker*, 4 K. & J. 483; *Valentine* v. *Fitzsimons*, [1894] 1 Ir. R. 93.

So if property is given to A for life and "at her death to be equally divided among my brothers and sisters at her death," this means brothers and sisters living at her death (*r*). Or the testator may expressly give the property to the persons who at a specified future time (such as the death of the tenant for life) shall be his next-of-kin, and then the class is an artificial class, to be ascertained on the hypothesis that the testator dies at that time (*s*). The same result follows if he gives it to the persons who would be his next-of-kin if he died at a specified future time (*t*). Where the gift is to the persons who would be the next-of-kin of a married woman if she had survived her husband and died intestate, it has been held in some cases that the sole object of these or similar words is to exclude the husband, and that the next-of-kin should be ascertained at the wife's death (*u*). But this construction seems erroneous (*x*). In cases where the period for ascertaining the next-of-kin is not clearly defined, the class will be ascertained at the testator's death (*y*).

Artificial class of next-of-kin.

Gift to persons "then entitled."

Where the gift is not to those who will then be, but to those who will (or would) then be "entitled" as, next-of-kin by statute, the word "then" will be understood as referring to the period when they will be entitled in possession. The persons to take will be, not those who would have been entitled if the testator had then died, but those who would then be entitled if the testator, when he died, had died intestate (*z*). Moreover, "then" has more meanings than one, each equally common: it may mean "at that time" or "in that case" (*a*); and unless the latter meaning be excluded by the context, it will be adopted rather than construe "next-of-kin according to the statute" (the statute being expressly referred to), as meaning something different from what the statute says it means. This construction was carried to its extreme limit in *Cable* v. *Cable* (*b*), where a

"Then" not always an adverb of time.

(*r*) *Re Dowson*, [1909] W. N. 245.

(*s*) *Sturge and G. W. Ry.*, 19 Ch. D. 444.

(*t*) *Bessant* v. *Noble*, 26 L. J. Ch. 236; *Horn* v. *Coleman*, 1 Sm. & G. 169; *White* v. *Springett*, L. R. 4 Ch. 300.

(*u*) *Druitt* v. *Seaward*, 31 Ch. D. 234; *Re Bradley*, 58 L. T. 631.

(*x*) *Clarke* v. *Hayne*, 42 Ch. D. 529; *Re King's Settlement*, 60 L. T. 745; *Re Peirson's Settlement*, 88 L. T. 794, where the earlier cases on settlements are cited.

(*y*) *Fletcher* v. *Fletcher*, 3 D. F. & J. 775.

(*z*) *Bullock* v. *Downes*, 9 H. L. C., pp. 1, 19; *Mortimore* v. *Mortimore*, 4 A. C. 448, affirming *Mortimer* v. *Slater*, 7 Ch. D. 322; *Michell* v. *Bridges*, 13 W. R. 200; *Day* v. *Day*, Ir. R. 4 Eq. 385; *Re Morley's Trusts*, 25 W. R. 825, is *contra*, *sed qu.*

(*a*) See 7 H. L. C., at p. 119; *Harrington* v. *Harte*, 1 Cox, 131.

(*b*) 16 Bea. 507; see also *Wheeler* v. *Addams*, 17 Bea. 417; *Lees* v. *Massey*, 3 D. F. & J. 113; *Moss* v. *Dunlop*, Joh. 490 ("next-of-kin for the time being"); *Archer* v. *Jegon*, 8 Sim. 446; *Fletcher* v. *Fletcher*, 3 D. F. & J. 775.

testator bequeathed a fund in trust for his wife for life, and at her death for his children; but if he left no children at his decease, then and in such case the fund was, from and immediately after his wife's decease, to become the property of the person or persons who should then become entitled to take out administration as his personal representative or representatives, under the statute of distribution, in case he had died intestate and unmarried. The testator left no children, and Romilly, M.R., held that the next-of-kin at the death of the testator were entitled to the fund.

Re Wilson.

The authorities were much discussed in *Re Wilson* (*c*), where the gift was to the testator's nephew S. for life, and after his death for his children who should attain twenty-one, etc., and the issue of children dying in his lifetime; if no child or other issue of S. attained a vested interest, the fund was to be held in trust "for such person or persons as on the death of S. shall be entitled to [*sic*] as my next-of-kin under the statute"; consequently the death of S. and the time of distribution were not necessarily the same; so that the case in this respect resembled *Sturge and G. W. Railway Co.*, but it was held by Parker, J., that the word "entitled" distinguished the case before him from *Sturge and G. W. Railway Co.*, and that the class to take were the next-of-kin of the testator at the time of his death.

The cases were again considered by the House of Lords in *Hutchinson* v. *National Refuges for Homeless and Destitute Children* (*d*). In that case the words were "on the failure of all the trusts hereinbefore declared of the residue of my personal estate such residue shall be in trust for such person or persons as on the failure of such trusts shall be my next of kin and entitled to my personal estate under the Statutes for the Distribution of the Estates of Intestates, such persons if more than one to take distributively according to the said Statutes." It was held that the gift was in favour of those persons who would have been the next-of-kin of the testator under the statutes of distribution if he had died at the date of the failure of the antecedent trusts.

IX.—Gifts to Persons of Testator's Name.—Mr. Jarman

(*c*) [1907] 1 Ch. 450, affirmed C. A., [1907] 2 Ch. 572.

(*d*) [1920] A. C. 794, following *Wharton* v. *Barker*, 4 K. & J. 483; *Sturge and G. W. Ry. Co.*, 19 Ch. D. 444; *Re McFee*, 79 L. J. Ch. 676; *Re Helsby*, 84 L. J. Ch. 682; 112 L. T. 539; and *Re Mellish*, [1916] 1 Ch. 562; and distinguishing *Bullock* v. *Downes*, 9 H. L. C. 1; *Mortimer* v. *Mortimer*, 4 A. C. 448; and *Re Wilson*, [1907] 2 Ch. 572. See also *Lucas Tooth* v. *Lucas Tooth*, [1921] 1 A. C. 594 (time for ascertaining heir to a baronetcy).

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Gifts to persons of testator's name.

continues (*e*): "Sometimes (as in the last case) (*f*) it is made part of the description or qualification of a devisee or legatee, that he be of the testator's name. The word 'name,' so used, admits of either of the following interpretations:—First, as designating one whose name answers to that of the testator (which seems to be the more obvious sense); and, secondly, as denoting a person of the testator's family; the word 'name' being, in this case, synonymous with 'family' or 'blood.' The former, as being the more natural construction, prevails in the absence of an explanatory context; and such is most indisputably its meaning, when found in company with some other term or expression, which would be synonymous with the word 'name,' if otherwise construed; for no rule of construction is better established, or obtains a more unhesitating assent, than that where words are susceptible of several interpretations, we are to adopt that which will give effect to every expression in the context, in preference to one that would reduce some of those expressions to silence.

To next-of-kin of testator's name.

"Thus, where a testator gives to the next-*of-kin* of his name (*g*), or to the next of his name *and blood* (*h*), it is evident that he does not use the word 'name' as descriptive of his relations or family only, because that would be the effect, if the mention of the name were wholly omitted, and the gift had been simply to his next-of-kin or the next of his blood; and hence, according to the principle of construction just adverted to, it is held that the testator means additionally to require that the devisee or legatee shall bear his name. Where, on the other hand, the testator gives to the next of his name (*i*), there is ground to presume that he intends merely to point out the persons belonging to his family or stock, without regard to the surname they actually bear. Such was the construction which prevailed in the case of *Pyot* v. *Pyot* (*k*), where a point of this

(*e*) First ed., Vol. II, p. 61.

(*f*) The case referred to by Mr. Jarman is *Pearce* v. *Vincent*, 2 Kee. 230, where the devise was to "the next or nearest relation or nearest of kin of [the testator] of the name of Pearce," etc.

(*g*) *Jobson's Case*, Cro. Eliz. 576. See *Re Roberts*, 19 Ch. D. 520, *post*, p. 1626.

(*h*) *Leigh* v. *Leigh*, 15 Ves. 92.

(*i*) "But see *Bon* v. *Smith*, Cro. El. 532, where a declaration by the testator, that, in a certain event, lands should remain to the next of his name, was considered to require that the devisee should have borne the testator's name. The point, however, did not call for adjudication; and the propriety of the dictum was (as we shall see) questioned by Lord Hardwicke, in *Pyot* v. *Pyot*, 1 Ves. sen. 337, *post*, who seems to have included in his condemnatory strictures *Jobson's Case*, Cro. El. 576, where the language of the will was different; the devise being 'to the next-*of-kin* of my name,' and which, therefore, according to the reasoning in the text, was properly construed as importing that the devisee should, in addition to being of the testator's family, bear his name." (Note by Mr. Jarman.)

(*k*) 1 Ves. sen. 335, Belt's ed.

nature underwent much discussion." In that case a testatrix devised her estate, real and personal, to trustees, and their heirs, executors, administrators and assigns in trust, first for her daughter Mary, and her heirs, executors, administrators and assigns for ever; provided that, if she (Mary) died before twenty-one or marriage, then in trust to convey and assign all the residue of her estate to her *nearest relation of the name of the Pyots*, and to his or her heirs, executors, administrators, and assigns. Mary died under twenty-one, and unmarried. At the death of the testatrix there were three persons then actually of the name of Pyot, namely, the plaintiff, and also his two sisters who were then unmarried, but who married before the happening of the contingency. There was also a sister, who, prior to the making of the will, was married, and, consequently, at the death of the testatrix, was not of that name. An elder brother of these persons had died before the testatrix, leaving a son also of the name of Pyot, who was her heir-at-law, but who, of course, was one degree more remote than the others. Lord Hardwicke, taking "relation" to be *nomen collectivum* (like "heir" or "kindred"), said he thought "*the Pyots*" described a particular stock, and that the name stood for the stock; and that the heir-at-law was excluded, not being within the description of the nearest relation: he therefore held that the plaintiff and his three sisters were entitled (*l*).

To the "nearest relation of the name of the Pyots."

So, in *Mortimer* v. *Hartley* (*m*), where a testator devised lands to his son J., on condition that neither he nor his heirs should sell the same, it being the testator's desire that they should be kept in the Westermans' name; and if J. died without leaving lawful issue, then the testator's daughter A. to have her brother's share subject to the same restrictions, it was held that the word "name" must be construed to mean "family" or "right line," for the son J. was held to take an estate tail, and the daughter was to take subject to the same restrictions, that is, an estate tail also, in which case the lands would devolve upon persons not bearing the name of Westerman.

To be kept in the W.'s name. "Name" held to mean family.

Mr. Jarman continues (*n*): "Where a gift to persons of the testator's name is held, according to the more obvious sense, to point to persons whose names answer to that of the testator, of course it does not apply to a female who was originally of that name, but has lost it by marriage. As in *Jobson's Case* (*o*), often before cited, which was a devise of lands in tail, the

As to females losing name by marriage.

(*l*) Followed by Shadwell, V.-C., in *Carpenter* v. *Bott*, 15 Sim. 606 (gift to "next-of-kin of the surname of C.").

(*m*) 6 Exch. 47.

(*n*) First ed., Vol. II, p. 65.

(*o*) Cro. Eliz. 576. See also *Bon* v. *Smith*, *ib.* 532; *Doe* d. *Wright* v. *Plumptre*, 3 B. & Ald. 474.

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remainder to the next-of-kin of the testator's name. The next-of-kin, at the date of the will, and also at the death of the testator, was his brother's daughter, who was then married to J. S.; and, on the death of the tenant in tail, without issue, the question was, whether she should have had the land? and it was held, that she should not, because she was not then of the name of the devisor.

Acquisition or assumption of name.

"Another question is, whether gifts of this nature apply in cases the converse of the last, *i.e.*, to a person who, being originally of another name, has subsequently acquired the prescribed name by marriage, or by voluntary assumption, either under the authority of a royal licence, or the still more solemn sanction of an Act of Parliament or without any such authority (*p*).

Devise to persons of testator's name and blood.

"In the case of *Leigh* v. *Leigh* (*q*), the testator, after limiting estates to his two sisters and their issue in strict settlement, devised the property, on failure of those estates, to the first and nearest of his kindred, being male *and of his name and blood*, that should be living at the determination of the estates before devised, and to the heirs of his body; Lord Eldon, with Mr. Baron Thompson, and Mr. Justice Lawrence, held, that a person, who answered the other parts of the description, but of another name, was not qualified, in respect of the name, by his having, before the determination of the preceding estates, obtained his Majesty's licence that he and his issue might use the surname of Leigh instead of his own name, and having since assumed it. That the design of the testator, in this case, was the exclusion of the female line, and that he was not influenced solely by attachment to the name, (one of which objects he must have had in view,) appeared from his not having imposed the obligation of assuming his name upon the issue of his sisters taking under the prior limitations."

Re Roberts.

But, in *Re Roberts* (*r*), where a person had assumed the name of R. G., and the gift was to his descendants who should bear the name of R. G. only, and there was a clause of forfeiture on abandoning the name, it was held that the gift included a descendant of R. G. who had assumed the name by royal licence. The question in these cases is whether the testator wishes to confine his bounty to members of a certain family (*s*), or whether he wishes to perpetuate a certain name.

In *Leigh* v. *Leigh* (*t*), Lord Eldon said that if a person

(*p*) As to the voluntary assumption of a name, *ante*, p. 1514.
(*q*) 15 Ves. 92.
(*r*) 19 Ch. D. 520.
(*s*) As in *Barlow* v. *Bateman*, 2 Br. P. C. 272, *ante*, p. 1515.
(*t*) *Supra*.

acquires a new name by royal licence or by Act of Parliament, he does not thereby lose his original name: "a legacy given by that name might be taken." The licence or statute is simply permissive.

Person assuming new name may take under original name.

Mr. Jarman continues (*u*): "The remaining question, applicable to the gifts under consideration, is, at what time the devisee or legatee must answer the prescribed qualification or condition in regard to the name, supposing the will to be silent on the point.

At what period legatee must answer prescribed description.

"If the devise confers an estate in possession at the testator's decease, that obviously is the point of time to which the will refers; and even where the devisee might, in other respects, take at the testator's decease an absolutely vested estate in remainder, it should seem that the same construction prevails. Such was the unanimous opinion of the Court in the two early cases of *Bon* v. *Smith* (*w*), and *Jobson's Case* (*x*), where lands were devised to A. in tail, with remainder to the next of the testator's name, or the next-of-kin of his name; and it was admitted, in both cases, that the testator's daughter, if she had answered the description *at the death of the testator*, would have been entitled.

Pyot v. *Pyot*.

"But in *Pyot* v. *Pyot* (*y*), Lord Hardwicke considered that a different rule is applicable to executory devises, which are fettered with such a condition. The devise there was (as we have seen) to A. and her heirs, and, in case she should die before twenty-one or marriage, then to the testator's nearest relation of the name of the Pyots; and his Lordship expressly distinguished the case before him from *Jobson's Case*, where he said it was not a contingent limitation over upon a fee devised precedent, nor was it a contingent, but a vested remainder, and therefore referred to the time of making the will [*quære*, the death of the testator?] (*z*); whereas, in the case before the Court, the description of the person must refer to the time of the contingency happening, *viz.* such as, at that event, should be the testator's nearest relation of the name of the Pyots (*a*).

Remarks upon Lord Hardwicke's doctrine in *Pyot* v. *Pyot*.

"If such a construction can be sustained, it must embrace all executory gifts to persons answering a prescribed character, as, to next-of-kin, heir, and other such persons; for it is difficult to perceive any valid reason for making the gifts under consideration the subject of any peculiar rule in this respect; and, as general doctrine, his Lordship's proposition would have to

(*u*) First ed., Vol. II, p. 66.
(*w*) Cro. Eliz. 532.
(*x*) *Ib.* 576.
(*y*) 1 Ves. sen. 335, Belt's ed.; *ante*, p. 1625.
(*z*) The *quære* is Mr. Jarman's.
(*a*) See further, on this point, *Gulliver* v. *Ashby*, 4 Burr., at p. 1940; *Lowndes* v. *Davies*, 2 Scott, 71; *ante*, p. 1514.

contend with a large amount of authority, including those cases in which (as we have seen) the words 'next-of-kin' have been held to designate the next-of-kin at the time of distribution, on other special grounds (*b*): for it would have been idle to discuss the question, whether an executory gift to the next-of-kin applied to the person answering the description of next-of-kin when such gift took effect in possession, on the special ground that the prior legatee was sole next-of-kin, or one of the next-of-kin at the death of testator, if, by the general rule, an executory bequest to next-of-kin applied to the persons answering the description when the bequest took effect in possession."

Gifts to "friends."

X.—Gifts to Friends.—In *Coogan* v. *Hayden* (*c*), a testator devised lands to his wife for life, provided she remained unmarried, and directed that on her death or marriage the lands should revert to his friends and be their property: it was held that the testator's heir-at-law became entitled under the devise.

The meaning of "friends and relations" in a power of appointment has been already considered (*d*).

(*b*) *Ante*, p. 622.
(*c*) 4 L. R. Ir. 585.
(*d*) *Ante*, p. 796.

CHAPTER XLII.

DEVISES AND BEQUESTS TO CHILDREN, GRANDCHILDREN, ETC.

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Gifts to children as purchasers.

I.—Who are included in the Expressions "Children," "Grandchildren," etc.—In this chapter Mr. Jarman treats of gifts to children (or grandchildren) as purchasers. The use of the word "children" as a word of limitation is considered in a subsequent chapter (*a*), where also the construction of such gifts as "to A and his children" is explained.

Illegitimate children.

The rule that a gift to "children" *prima facie* imports legitimate children, and the rules for determining questions of legitimacy, are considered in a subsequent chapter (*b*).

(*a*) Chap. L.

(*b*) Chap. XLIII. Adopted children are not included: Adoption of Children Act, 1926, s. 5, sub-s. 2. It is hardly necessary to say that a monster is not regarded by the law as a child: *Inter liberos non computantur . . . qui contra formam humani generis converso more procreantur, ut si mulier monstruosum vel prodigiosum sit enixa.* Bract. 5, Co. Litt. 7 *b*, Black Comm. ii. 246. But an hermaphrodite is a child, according to the prevailing sex: Co. Litt. 8 *a*; Shepp. Touch. 235.

"Children," how construed.

"The legal construction of the word *children*," says Mr. Jarman (*c*), "accords with its popular signification (*d*); namely, as designating the immediate offspring; for, in all the cases in which it has been extended to a wider range of objects, it was used synonymously with a word of larger import, as issue (*e*).

Whether it extends to grandchildren, and when.

It has sometimes been asserted, however, that a gift to children extends to grandchildren, where there is no child. Thus, in *Crooke* v. *Brookeing* (*f*), though the claim of grandchildren to be entitled in conjunction with a surviving child under a bequest to 'children,' was rejected, yet the Lords Commissioners considered, that, if there had been no child, they might have taken. Lord Alvanley, too, in the subsequent case of *Reeves* v. *Brymer* (*g*), laid it down, that 'children may mean grandchildren, where there can be no other construction; but not otherwise.' Sir W. Grant, also, seems rather to have assented to than denied the doctrine, though he refused to apply it to a case (*h*) in which there was a gift to the children of several persons deceased equally *per stirpes*, and one of the persons was, at the making of the will, dead, leaving grandchildren, but no child; his Honor being of opinion, that, as there were children living of the other persons, as to whom, therefore, the gift was clearly confined to those objects, he was precluded from giving the word a different signification in the other instance. The same learned Judge, on another occasion (*i*), refused to let in a great-grandchild under the description of 'grandchildren,' there being grandchildren; though he admitted, that 'where there is a total want of children, grandchildren have been let in, under a liberal construction of "children."'"

Gift to children of A.

If the gift is simply to the children of A, who is mentioned in the will as being dead (*e.g.*, "to the children of my late brother A"), and at the date of the will there are no children of that person, but there are grandchildren, then the Court, on the principle *ut res magis valeat*, holds that the gift takes effect in favour of the grandchildren (*j*). But if the gift is to the

(*c*) First ed., Vol. II, p. 69.

(*d*) The French word *enfants* receives the same construction: *Duhamel* v. *Ardovin*, 2 Ves. sen. 162. As to the rule in those parts of Canada where the old French law prevails, see *Martin* v. *Lee*, 9 W. R. 522.

(*e*) *Wythe* v. *Blackman* or *Wythe* v. *Thurlston*, Amb. 555; 1 Ves. sen. 196; *Gale* v. *Bennet*, Amb. 681; *Chandless* v. *Price*, 3 Ves. 99; *Royle* v. *Hamilton*, 4 Ves. 437. As to *Gale* v. *Bennet*, see *Pride* v. *Fooks*, 3 De G. & J. 252, *post*, p. 1633.

(*f*) 2 Vern. 106.

(*g*) 4 Ves. at p. 698. See also his judgment in *Royle* v. *Hamilton*, 4 Ves. at p. 439.

(*h*) *Radcliffe* v. *Buckley*, 10 Ves. 195; *Moor* v. *Raisbeck*, 12 Sim. 123.

(*i*) *Earl of Orford* v. *Churchill*, 3 V. & B. 59.

(*j*) *Per* Kay, J., in *Re Smith*, 35 Ch. D. at p. 559. The principle thus laid down was followed by Romilly, M.R., in *Fenn* v. *Death*, 23 Bea. 73, and by Stuart, V.-C. in *Berry* v. *Berry*, 3 Giff. 134.

children of the late A B, the late C D, and the late E F, and some of these have left children, and one has left grandchildren only, then the Court considers there is a difficulty in holding that the word "children," only once used, can have a different meaning where there are in one case children and in another case grandchildren (*k*).

Gift to children of A, B. and C.

This was Sir W. Grant's difficulty in *Radcliffe* v. *Buckley* (*l*), and the argument prevailed with Pearson, J., in *Re Kirk* (*m*). In that case one share of residue was given to the children of the late A, another to the children of the late B, and so on; there were living at the date of the will children of A and grandchildren (but no children) of B; it was held that the grandchildren of B did not take. But in the exactly similar case of *Re Smith* (*n*), Kay, J., decided in favour of the grandchildren, distinguishing the case before him from *Radcliffe* v. *Buckley* for the reason that in the older case the residue was given in the mass, while in *Re Smith* it was given in separate shares. *Re Kirk* was not cited.

Knowledge of state of family must be proved.

In such cases as those under discussion it seems to be essential that the state of the family should be known to the testator and that his knowledge of it should be proved: it cannot be presumed (*o*).

Whether issue remoter than grandchildren can take.

The decision in *Re Smith* was based on the theory that the testator used the word "children" in the sense of "offspring," and it seems to follow that where this construction is adopted, all the issue or descendants of the *propositus* take *per capita* (*p*). It is true that in *Fenn* v. *Death* (*q*), Romilly, M.R., came to a different conclusion; in that case there was a gift to the children of A B; at the date of the will A B and all his children were dead, but there were grandchildren and great-grandchildren of A B living; it was held that the grandchildren living at the death of the testatrix were entitled, to the exclusion of the great-grandchildren. But this seems contrary to principle, and also to the dicta of the L.JJ. in *Pride* v. *Fooks* (*r*). In that case, Turner, L.J., said (*s*): "The principle which extends the limitation to the grandchildren must, as I conceive, extend it also to the more remote issue. I can see no ground on which the limi-

(*k*) *Per* Kay, J., in *Re Smith*, 35 Ch. D. 558, *supra*.
(*l*) *Ante*, p. 1630.
(*m*) 52 L. T. 346.
(*n*) 35 Ch. D. 558.
(*o*) *Per* Lord Cranworth, *Crook* v. *Whitley*, 7 D. M. & G. at p. 496.
(*p*) Compare the cases on gifts to "issue" and "descendants" *ante*, pp. 1561, 1558.
(*q*) 23 Bea. 73.
(*r*) *Post*, p. 1633.
(*s*) 3 De G. & J. at p. 275.

tation, if it extends beyond the children, can be confined to the grandchildren, or on which the great-grandchildren mentioned in the course of the argument can be excluded."

No fixed rule of construction.

In *Re Atkinson* (*t*), Younger, J., said that, in his judgment, *Re Smith* (*u*) where it differs from the principles laid down in *Re Kirk* (*x*) ought not to be followed. There is no fixed rule of construction that if a legacy is given to the children of a person who was known by the testator to be dead at the date of the will and to have had no child then living, grandchildren will take.

Construction is confined to cases where the gift otherwise never could have had an object.

The extension of gifts to children to more remote descendants is an illustration of the principle that words may be carried beyond their ordinary signification, from the want of other persons or things more nearly answering to the terms of description used, in order to avoid the evident absurdity of supposing the testator to have made a gift without an actual or possible object (*y*). "But this reasoning," as Mr. Jarman points out (*z*), "does not apply to a case in which the gift, being to the children of a person *living*, might in event include objects subsequently coming *in esse*; so that no inference, that the testator does not mean children properly so called, arises from the fact of there being no child when he makes the gift. To apply the doctrine in question to such a case, is to allow the construction to be influenced by subsequent circumstances, in opposition to a well-known rule. Besides, it denies to a testator the power of giving to children, to the exclusion of descendants of another generation (which is certainly a possible intention), without using words of exclusion, though he might reasonably suppose the intention to exclude them was sufficiently apparent by the mention of another class of objects, and not of them. In the case of a gift to A, and, after his death, to his children living at his decease, and if he dies without leaving children, to B and his children; the testator may choose to prefer A and his children, to B and his children; but it does not follow that he intends the same preference to extend to the *grandchildren* of A. It seems probable, therefore, that the Courts at this day would not apply to grandchildren a gift to children, on account of there being in event no immediate objects, as such a construction is clearly inconsistent with sound principles of interpretation; and all the authority which can be

(*t*) [1918] 2 Ch. 138, at p. 145.
(*u*) 35 Ch. D. 558.
(*x*) 52 L. T. 346.
(*y*) For other illustrations of the principle see *Day* v. *Trig*, 1 P. W. 286, *ante*, p. 1220; *Doe* d. *Humphreys* v. *Roberts*, 5 B. & Ad. 407, *ante*, p. 1247; *Gill* v. *Shelley*, 2 R. & My. 336.
(*z*) First ed., Vol. II, p. 71.

adduced in its favour, consists of dicta, which, in some cases (*a*), are rather weakened by the decisions with which they stand associated" (*b*).

Pride v. *Fooks.*

The principle here contended for by Mr. Jarman was subsequently established by the decision of the Court of Appeal in *Pride* v. *Fooks* (*c*), where a testator bequeathed his residuary estate in trust for "such child or children as his niece and two nephews, A, B and C should leave at their respective deceases," one-third to the "child or children" of A, and the two other thirds to the "child or children" of B and C in like manner; with cross executory limitations in case the niece or either of the nephews should die without leaving any "children or child," to the "children or child" of the other or others "leaving children or a child"; and in case all of them, his said nephews and niece, should die without leaving "any issue" lawfully begotten, the testator directed the whole of the residue to be divided between the three "children" of X equally, or in case of either of them being then dead, to the survivors or survivor and the "issue" of such as might be dead, such "issue" taking *per stirpes* and not *per capita*. The nephews and niece survived the testator, and died without leaving any children living at their respective deceases, but the niece left several grandchildren and one great-grandchild, and it was contended that, there being in event no children, the bequest to "children" ought to be extended to remoter issue: but it was held by K. Bruce and Turner, L.JJ., that the construction of the will could not thus be made dependent on subsequent events. This being so, and the case not being one in which the gift over without issue could be read "without such issue" (*d*), the residue was undisposed of.

And may be excluded, even from such cases, by context.

And even where, according to the state of facts at the date of the will, the gift could never have taken effect in favour of children, the context may be such as to exclude remoter issue. Thus, in *Loring* v. *Thomas* (*e*), where a testatrix bequeathed one

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(*a*) See *Radcliffe* v. *Buckley*, 10 Ves. 195.

(*b*) "In the case of *Loveday* v. *Hopkins*, Amb. 273, Sir T. Clarke, M.R., held, that grandchildren were not entitled under a bequest to 'heirs,' because the term appeared by the context of the will to be used in the sense of children. Sir E. Sugden has shown (Pow., 6th. ed., Vol. II, 273 [8th ed., 664]), that a power to appoint among children cannot be exercised in favour of grandchildren. He does not advert to any distinction in the case of there being no children. According to the doctrine which the present writer has endeavoured to refute, such a power would, *in that event*, extend to grandchildren." (Note by Mr. Jarman.)

(*c*) 3 De G. & J. 252. The decision in *Moor* v. *Raisbeck*, 12 Sim. 123, seems to have been based on the same principle.

(*d*) As to this, *vide post*, Chap. LII.

(*e*) 1 Dr. & Sm. pp. 497, 508. See also *Stevenson* v. *Abingdon*, 31 Bea. 305, stated *ante*, p. 1612.

part of her residue to the children of her deceased aunt A, and another part to the grandchildren of her deceased aunt B, and added a proviso giving certain directions in case the children of A or the grandchildren of B should die in her lifetime: there was no child of A living at the date of the will, but there were grandchildren, who claimed the part given to the children of A—Kindersley, V.-C., held that they were not entitled. He observed that it was said the testatrix must have used the word "children" inadvertently, and meant grandchildren. That must mean either that she intended to have written grandchildren, or that she used the word "children" as co-extensive with it. But this could not be maintained, since not only there, but in the proviso, he found that she clearly knew the distinction between children and grandchildren: she made the very distinction (*f*).

Whether "grandchildren" includes great-grandchildren.

The word "grandchildren" must, on the same principle, be confined to the single line or generation of issue, which it naturally imports. Lord Northington, indeed, in *Hussey* v. *Berkeley* (*g*), expressed an opinion that the word grandchildren would, without further explanation, comprehend great-grandchildren; the term being, he thought, in common parlance used rather in opposition to children, than as confined to the next generation. "But," as Mr. Jarman points out (*h*), "in the case before his Lordship, the testator had explained this to be his construction, by applying in another part of his will the term 'grandchild' to a great-grandchild. And the contrary of Lord Northington's doctrine was determined by Sir W. Grant, in the case of the *Earl of Orford* v. *Churchill* (*i*), in which, however, it is remarkable, that neither his Lordship's dictum nor decision was noticed."

"Children" when synonymous with "issue."

Mr. Jarman continues (*k*): "It should be observed, however, that, in a considerable class of cases, the word child or children has received an interpretation extending it beyond its more precise and obvious meaning, as denoting immediate offspring, and been considered to have been employed as *nomen collectivum*, or as synonymous with *issue* or *descendants*; in which general sense it has often the effect, when applied to real estate, of creating an estate tail. Where this construction has prevailed, however, it has generally been aided by the context."

(*f*) The V.-C. added, "a third alternative construction would be that she thought the grandchildren really were children; but that would be inconsistent with the evidence which proved that she was acquainted with the state of the family."

(*g*) 2 Ed. 194; Amb. 603 (*Hussey* v. *Dillon*).

(*h*) First ed., Vol. II, p. 72.

(*i*) 3 V. & B. 59.

(*k*) First ed., Vol. II, p. 73.

The cases to which Mr. Jarman refers appear to be those in which there is a gift to "A. and his children," and the question is whether "children" is used as a word of limitation, as synonymous with "issue." This, of course, is quite a different question from the one now under discussion, namely, whether in a gift to "the children of A." the word "children" can be treated as synonymous with "issue." It is certain that this can be done in a clear case, as in *Wyth* v. *Blackman* (*l*), or where the will is so obscurely worded that the meaning is more or less a matter of conjecture, and the balance is in favour of the wide construction (*m*). The decision in *Gale* v. *Bennet* (*n*) appears to have turned on this question (*o*). In *Re Crawhall's Trust* (*p*), a testator bequeathed a fund in trust for A for life and after her death upon trust for "the children of my late sister Mary Vickers (the issue of Ann Ion excepted) of my late sister Hannah Alcock, and of my said sister Frances Bates"; Ann Ion was a daughter of Mary Vickers, and died before the testator: Mrs. Farrar, one of the children of Hannah Alcock, predeceased the tenant for life, leaving children; it was held that the words in the parenthesis showed that the testator did not use "children" in its strict sense, and that consequently the children of Mrs. Farrar were entitled to the share which she would have taken if living.

Wide construction of gifts to children and other issue.

The Courts do not willingly restrict the generality of a gift to children or more remote issue. On this principle, it has been held that if a testator bequeaths legacies to a large number of his grandchildren by name, and afterwards gives the residue to "my grandchildren," this includes all his grandchildren, and is not limited to the grandchildren previously named (*q*). Another decision of Romilly, M.R. (*r*), carried this principle to its extreme limit: in that case a gift which, taken literally, was confined to the testator's children born or *en ventre* at

(*l*) 1 Ves. sen. 196; or *Wythe* v. *Thurlston*, Amb. 555, 3 Ves. 257. The case is stated shortly *ante*, p. 1574. See also *Chandless* v. *Price*, 3 Ves. 99; *Dalzell* v. *Welch*, 2 Sim. 319, and the other cases cited *ante*, p. 1574.

(*m*) As in *Royle* v. *Hamilton*, 4 Ves. 437.

(*n*) Amb. 681.

(*o*) See *per* Turner, L.J., in *Pride* v. *Fooks*, 3 De G. & J. 275. It may be noticed that the decision of Romilly, M.R., in *Pride* v. *Fooks* seems to have been that "children" was used as synonymous with "issue" (28 L. J. Ch. 84, note), although for some unexplained reason he excluded the issue remoter than grandchildren.

(*p*) 8 D. M. & G. 480.

(*q*) *Moffatt* v. *Burnie*, 18 Bea. 211. In the case of *Fullford* v. *Fullford*, 16 Bea. 565, Romilly, M.R., held that a clear gift by codicil to the testator's children then living by name, was overridden by a gift in the will to his children as a class. The same Judge's decision in *Fitzroy* v. *Duke of Richmond*, 27 Bea. 186, seems also of doubtful accuracy.

(*r*) *Goodfellow* v. *Goodfellow*, 18 Bea. 356. Compare *Pasmore* v. *Huggins*, 21 Bea. 103, *ante*, p. 575.

the date of the will, as *personæ designatæ*, was on "a fair construction" of the whole will held to include a child born four years afterwards. In *Re Stansfield* (*s*), Bacon, V.-C., went to the opposite extreme in order to save the share of a deceased child from lapse. But of course the word "children" will be given a restricted meaning if the intention of the testator is clear. Thus, in *Wallis* v. *Wallis* (*t*), the testator gave pecuniary legacies to each of his children B, C, and D, and gave his residue to his eldest son A; he directed that "in case of any of the younger children dying" under twenty-one or without leaving issue, their portion or portions should be divided "among the survivors"; shortly after the death of the testator, his wife gave birth to a fifth child, E: afterwards C died under twenty-one and unmarried: it was held that neither A nor E was entitled to any share of C's legacy.

Children "born," "to be born," etc.

The effect of the expressions "born," "begotten," "to be born," "to be begotten," "hereafter to be born," and "surviving," as applied to children, is considered in a later part of this chapter, in connection with the rules for ascertaining classes; gifts to posthumous children and children *en ventre*, are also discussed (*u*).

Child taking as individual and as member of class.

The mere fact that property is given specifically to one child by name will not prevent him from taking a share in the residue given to the children as a class (*x*). But he may be referred to in the residuary gift or gift over in such a way as to exclude him (*y*).

Child taking double share.

If a testator gives his residue to the children of his deceased nephews and nieces *per stirpes*, "and my great-niece J.," it seems that J. takes a share as "special legatee," and another share as a member of the class (*z*).

Child not excluded from class by implication.

Sometimes a testator gives property to one of his children for life, and after his death (there being generally intermediate limitations which fail) to the testator's children, and then the question arises whether the tenant for life takes as a member of the class, or whether it can be inferred from the scheme of the will that the testator did not intend to include him. The Courts seem reluctant to make this inference. Thus, in *Jennings* v. *Newman* (*a*), a testator gave a fund in trust for his daughter M. for life, with power to appoint to her children, and if she

(*s*) 15 Ch. D. 84, stated and commented on *ante*, p. 412. Compare *White* v. *Wakley*, 26 Bea. 23.
(*t*) 13 L. R. Ir. 258.
(*u*) *Post*, pp. 1674, 1677.
(*x*) *Reay* v. *Rawlinson*, 29 Bea. 88; *Carver* v. *Burgess*, 18 Bea. 541.
(*y*) *Hanna* v. *Bell*, 7 Ir. Ch. 208.
(*z*) *Woods* v. *Townley*, 11 Ha. 314.
(*a*) 10 Sim. 219. See *Almack* v. *Horn*, 1 H. & M. 630.

died without leaving a child, then he gave it to such of his children as should be living at his decease, and if either of his said children should die before they should be entitled to receive a share, leaving issue, the share was to be divided among the children of such deceased child. M. and four other children survived the testator, and afterwards M. died without issue: it was held by Lord Cottenham that her personal representatives were entitled to one-fifth of the fund.

Issue not included in class by implication.

Conversely, the Court will not include persons in a class unless the language of the will is clear. Thus, where a testator gave property to "all and every the children of my late brother J. C. who shall be living at my decease, or who shall have died in my lifetime, leaving issue, living at my death, in equal shares," it was held by Jessel, M.R., that only the children who survived the testator were entitled under the gift, and that the issue of a child who had died in the testator's lifetime took nothing (*b*).

"Children" includes children of different marriages.

Under a gift to the children of a person, his children by different marriages will generally be entitled; and it is not necessary to show that the testator had in view a future marriage, but only that the terms of the will are not so wholly inconsistent with such a notion as necessarily to limit the generality of the word children (*c*), in which latter case effect will of course be given to the testator's language (*d*). So in a gift to the children of A, a woman who has been twice married, the addition of the words "whether by her present or any future husband," do not exclude her children by her first husband (*e*). In a case of *Stavers* v. *Barnard* (*f*), where a testator bequeathed his personal estate to trustees, in trust to apply the interest thereof "in the maintenance of his children until the youngest attained twenty-one, and then to divide the same equally between A., B., C., and D., children by his former wife, and E. and F., children by his then present wife, and such other child or children as might be living, or as his said wife might be *enceinte* with at his decease"; Knight-Bruce, V.-C., held that two children by the first marriage, not named

(*b*) *Re Coleman and Jarrom*, 4 Ch. D. 165.

(*c*) *Barrington* v. *Tristram*, 6 Ves. 345; *Critchett* v. *Taynton*, 1 R. & My. 541; *Peppin* v. *Bickford*, 3 Ves. 570; *Ex p. Ilchester*, 7 Ves. 348; *Isaac* v. *Hughes*, L. R. 9 Eq. 191; *Andrews* v. *Andrews*, 15 L. R. Ir. 199; *Nash* v. *Allen*, 42 Ch. D. 54 (executory trust).

(*d*) *Coleman* v. *Seymour*, 1 Ves. sen. 209; *Stopford* v. *Chaworth*, 8 Bea. 331; *Re Parrott*, 33 Ch. D. 274 (executory trust); *Nash* v. *Allen*, *supra*.

(*e*) *Passmore* v. *Huggins*, 21 Bea. 103; *Re Pickup's Trusts*, 1 J. & H. 389. Other examples of the liberal construction given to the word "children" are referred to *post*, pp. 1672 *seq*.

(*f*) 2 Y. & C. C. C. 539; and see *Lovejoy* v. *Crafter*, 35 Bea. 149.

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in the will, but living at the date of the will and of the testator's death, were not entitled under the latter words of the bequest.

Children by affinity not included.

"It remains to be observed," says Mr. Jarman (*g*), "that a gift to children does not extend to children by affinity; consequently, a grandson's widow has been held not to be entitled under a devise to grandchildren" (*h*).

Step-children.

But a gift to "children" may take effect in favour of step-children, if circumstances show that that was the testator's intention. Thus in *Re Jeans* (*i*) a testator had been married for thirteen years and had no children of his own; he and his wife were each about sixty years old when he made a will in favour of his "children": it was held that his step-children, whom he had treated as his own children, were entitled under the gift.

As to class of children entitled.

II.—Time at which Class of Children is to be ascertained.—(A) *Preliminary.*—Mr. Jarman remarks (*k*) that "the question which has been chiefly agitated in devises and bequests to children is, as to the point of time at which the class is to be ascertained, or, in other words, as to the period within which the objects must be born and existent; supposing the testator himself not to have expressly fixed the period of ascertaining the objects, which, of course, takes the case out of the general rule; for example, a gift to children 'now living,' applies to such as are in existence at the date of the will (*l*), and those only; and a gift to children living at the decease of A. will extend to children existing at the prescribed period, whether the event happens in the testator's lifetime (supposing that they survive him), or after his decease (*m*).

"The following are the rules of construction regulating the class of objects entitled in respect of period of birth under general gifts to children."

(*g*) First ed., Vol. II, p. 73.

(*h*) *Hussey* v. *Berkeley*, 2 Ed. 194.

(*i*) 72 L. T. 835. *Re Baynham*, 7 T. L. R. 587, was an even stronger case, but there the step-children were held not entitled.

(*k*) First ed., Vol. II, p. 73.

(*l*) *James* v. *Richardson*, 1 Vent. 334, T. Raym. 330; *Burchett* v. *Durdant*, 2 Vent. 311. See also *Att.-Gen.* v. *Bury*, 1 Eq. Ca. Ab. 201; *Crosley* v. *Clare*, 3 Sw. 320 n.; *Abney* v. *Miller*, 2 Atk. 593; *Blundell* v. *Dunn*, 1 Madd. at p. 433.

(*m*) *Allen* v. *Callow*, 3 Ves. 289; *Turner* v. *Hudson*, 10 Bea. 222. It is hardly necessary to point out, that as these are gifts to classes, if any of the children "now living," or "living at the death of A" (supposing A to die before the testator), should die in the testator's lifetime, the share which such child would have taken will not lapse, but the surviving children will take the whole. Classes fluctuate both by diminution and by increase: here it would be by diminution only. See *Viner* v. *Francis*, 2 Cox, 190, and the other cases cited *ante*, p. 407.

Astbury, J.'s, statement of the rule.

The rule is stated by Astbury, J., in *Re Chartres* (*n*) in the following words: "The rule may be divided into three heads. First, if there is an immediate gift the rule lays down that only those children in existence at the testator's death shall take, although his intention was obviously different. By way of exception to this first head, if there are no children of A. in existence at the testator's death then the rule of convenience ceases to operate, and all subsequently born children take in accordance with the testator's intention. The second head of the rule may be stated as follows: If the gift is in future as for instance to A. for life with remainder to B.'s children, the rule provides that only those children of B. shall take who come into existence before A.'s death. Here again there is an exception that if there are no children of B. *in esse* before A.'s death, then the rule ceases to operate, and all subsequently born children take. The third head may be stated as follows: Where there is a gift to A. for life and after his death to B.'s children who attain twenty-one, then if at A.'s death there are children of B. who have attained twenty-one or the representatives of such children, the rule applies and the class closes. If at A.'s death there are only infant children of B. who subsequently attain twenty-one, then again the class closes when the first child so attains that age; and in all cases the rule is excluded if there is an express intention of the testator to the contrary."

Immediate gifts confined to children living at death of testator.

(B) *Where the Gift is immediate.*—Mr. Jarman continues (*o*): "An *immediate* gift to children, (*i.e.*, a gift to take effect in possession immediately on the testator's decease), whether it be to the children of a living (*p*) or a deceased person (*q*), and whether to children simply or to all the children (*r*), and whether there be a gift over in case of the decease of any of the children under age or not (*s*), comprehends *the children living at the testator's death* (*if any*), and those

(*n*) [1927] 1 Ch. 466, at pp. 471, 472. See *post*, p. 1681.

(*o*) First ed., Vol. II, p. 74.

(*p*) 2 Vern. 105; 1 Eq. Ca. Ab. 202, pl. 20; Pre. Ch. 470; 2 Vern. 545; *Horsley* v. *Chaloner*, 2 Ves. sen. 83; *Loveday* v. *Hopkins*, Amb. 273; *Hodges* v. *Isaac*, Amb. 348; *Roberts* v. *Higman*, 1 B. C. C. 532, n.; *Jones* v. *Earl of Suffolk*, *ib.* 528; *Singleton* v. *Gilbert*, 1 Cox, 68; *Viner* v. *Francis*, 2 Cox, 190, 2 B. C. C. 658; *Davidson* v. *Dallas*, 14 Ves. 576.

(*q*) *Viner* v. *Francis*, 2 Cox, 190.

(*r*) *Heathe* v. *Heathe*, 2 Atk. 121; *Singleton* v. *Gilbert*, 1 B. C. C. 542, n., 1 Cox, 68; *Scott* v. *Harwood*, 5 Mad. 332.

(*s*) *Davidson* v. *Dallas*, 14 Ves. 576; *Scott* v. *Harwood*, 5 Mad. 332. "But as the gift over necessarily suspends the distribution as to all, until the eldest attains twenty-one, ought not the children born in the interval to have been let in, seeing that these rules always aim at including as many objects as possible?" (Note by Mr. Jarman.)

only; notwithstanding some of the early cases, which make the date of the will the period of ascertaining the objects (*t*).

Rule applies to issue of every degree.

"It is scarcely necessary to observe, that this and the succeeding rules apply to issue of every degree, as grandchildren, great-grandchildren, etc., though cases to the contrary are to be found, especially at an early period. As in *Cook* v. *Cook* (*u*), where under an immediate devise (*i.e.*, a devise in possession) to the *issue* of J. S., (which was held to apply to the children and grandchildren,) a son born after the death of the testator was allowed to participate."

Rule does not apply where distribution postponed.

The rule under discussion is generally considered to have been adopted by the Courts as a matter of convenience. "The law sees no impossibility of having children at any number of years; and the not keeping demands of this sort open has very properly induced the Court to confine this to such children as were in being at death of testator, when the number is known, and the proportions they are entitled to, and the time when to receive it" (*x*). The rule usually defeats the intention of testators (*y*), and the tendency of the Courts is not to apply it unless it is necessary. It does not therefore apply in cases where the period of distribution is postponed or where there is no child in existence at the time when the gift is ready to take effect (*z*). It might also be supposed that it would not apply where the gift is one not of corpus but of income (*a*), but in *Re Powell* (*b*) Kekewich, J., held that this makes no difference, and that a gift of income to the children of A during their lives is confined to children born at the date of the testator's death.

But applies to gifts of income.

Rule may be excluded by clear words.

The operation of the rule may also be excluded by clear words; as where a testator gave property to certain children (naming them) of A the wife of B and "every other child hereafter to be born of the said A during the life of the said B or within nine months after his decease" (*c*).

Clause of substitution.

Where there is a gift to children, followed by a clause of substitution in the event of the death of any child before a

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(*t*) *Coleman* v. *Seymour*, 1 Ves. sen. 209. See *Northey* v. *Strange*, 1 P. W. 340; *S.C.* nom. *Northey* v. *Burbage*, Gilb. Rep. Eq. 136, Pre. Ch. 470.

(*u*) 2 Vern. 545. See *Weld* v. *Bradbury*, 2 Vern. 705, and the notes to that case.

(*x*) *Per* Strange, M.R., in *Horsley* v. *Chaloner*, 2 Ves. sen. at p. 84.

(*y*) *Per* Lord Thurlow, *Hill* v. *Chapman*, 1 Ves. jun., at p. 407; 3 Br. C. C. 391.

(*z*) *Post*, pp. 1650, 1662.

(*a*) See *Re Wenmoth's Estate*, 37 Ch. D. 266, referred to *post*, p. 1655.

(*b*) [1898] 1 Ch. 227. As to a provision for the accumulation of the income of a child's share of income during minority to form part of the residuary estate, see *Fulford* v. *Hardy*, [1909] A. C. 570 (appeal from Ontario).

(*c*) *Hodson* v. *Micklethwaite*, 2 Dr. 294. Compare *Scott* v. *Scarborough*, 1 Bea. 154.

certain time, different considerations arise. These cases are dealt with elsewhere (*d*).

Gift to children for life with remainder to their children.

Where there is a gift to the children of the testator for their respective lives in equal shares, with remainder upon the death of each child to his or her children, the children of a child of the testator who was dead at the date of the will are not entitled to share (*e*). Such a conclusion follows almost necessarily from the scheme of the will, for it is hardly credible that a testator would give a life estate to a deceased child. In such cases as this, the primary meaning of "children" in the original gift is children living at the date of the will. A similar construction prevails, *prima facie*, in cases of substitution (*f*). But the construction may be excluded either by the context, or by the state of facts at the date of the will. Thus where a testator gave his residue (in effect) to his brothers and sisters in equal shares during their respective lives, with remainder as to their respective shares to their respective children, and it appeared that at the date of the will the testator had only one brother, his other brother and his sister being then dead, it was held that the property was divisible among the three families *per stirpes* (*g*).

Effect of gift over.

It will be remembered that, according to Mr. Jarman's statement of the general rule now under consideration (*h*), it applies "whether there be a gift over in case of the decease of any of the children under age or not." But it seems that if there is a bequest to the children of A, with a gift over in the event of A having no children, all A's children are entitled to share, whether born before or after the testator's death. This is the conclusion come to by Mr. Roper (*i*), and it seems to be justified by the cases cited by him (*k*), although the actual decisions in those cases may be supported on another ground (*l*).

Intermediate income.

In these cases in which the general rule does not apply, and in which the class is consequently liable to increase from time to time by the birth of other children, if the gift is one of residue or of an income-bearing fund, the income is divisible among those members of the class who are for the time being

(*d*) Chap. XXXVI, *ante*, p. 1296.
(*e*) *Re Wood*, [1894] 3 Ch. 381.
(*f*) See Chap. XXXVI.
(*g*) *Walsh* v. *Blayney*, 21 L. R. Ir. 140. Compare *Gowling* v. *Thompson*, 11 Eq. 366 n.; *Re Jordan's Trust*, 2 N. R. 57, and other cases cited *ante*, pp. 1303, 1509.
(*h*) *Ante*, p. 1639.
(*i*) Legacies, pp. 41-2, 57.
(*k*) *Shepherd* v. *Ingram*, Amb. 448; *Hutcheson* v. *Jones*, 2 Madd. 124. Compare the analogous cases of *Mills* v. *Norris*, 5 Ves. 335, and *Defflis* v. *Goldschmidt*, 1 Mer. 417, cited *post*, pp. 1656, 1657.
(*l*) See the statement of *Shepherd* v. *Ingram*, *post*, p. 1633, and *Hutcheson* v. *Jones*, *post*, pp. 1667, 1668.

in existence, so that as the class increases the share of each member in the income diminishes. A member is not entitled to share in the by-gone income which accrued before his birth (*m*).

In future gifts, children born before period of distribution let in.

(C) *Where the Gift is future.*—Mr. Jarman continues (*n*): "Where a particular estate or interest is carved out, with a gift over to the children of the person taking that interest, or the children of any other person, such gift will embrace not only the objects living at the death of the testator, *but all who may subsequently come into existence before the period of distribution* (*o*). Thus in the case of a devise or bequest to A. for life, and after his decease to his children, or (which is a better illustration of the limits of the rule, since, in the case suggested, the parent being the legatee for life, all the children who can ever be born necessarily come *in esse* during the preceding interest,) to A. for life, and after his decease to the children of B., the children (if any) of B. living at the death of the testator, together with those who happen to be born during the life of A., the tenant for life, are entitled, but not those who may come into existence after the death of A. (*p*).

Rule applies where interest bequeathed is reversionary.

"The rule is the same where the life interest is not of the testator's own creation, but is anterior to his title (*q*).

Children take vested shares, liable to be divested *pro tanto*.

"In cases falling within this rule, the children, if any, living at the death of the testator, take an immediately vested interest in their shares, subject to the diminution of those shares (*i.e.*, to their being divested *pro tanto*), as the number of objects is augmented by future births, during the life of the tenant for life; and, consequently, on the death of any of the children during the life of the tenant for life, their shares (if their interest therein is transmissible) devolve to their respective representa-

(*m*) *Shepherd* v. *Ingram*, Amb. 448; *Mills* v. *Norris*, 5 Ves. 335. See *post*, p. 1665. The authorities are cited and compared in *Re Holford*, [1894] 3 Ch. 30.

(*n*) First ed., Vol. II, 75. See Astbury, J.'s, statement quoted above, p. 1639.

(*o*) 9 Mod. 104; 1 Atk. 509; 2 Atk. 329; *Bartlett* v. *Hollister*, Amb. 334; *Ellison* v. *Airey*, 1 Ves. sen. 111; *Ayton* v. *Ayton*, 1 Cox, 327; Cowp. 309; *Devisme* v. *Mello*, 1 Br. C. C. 537; *Middleton* v. *Messenger*, 5 Ves. 136; *Walker* v. *Shore*, 15 Ves. 122; *Mogg* v. *Mogg*, 1 Mer. 654; *Crone* v. *Odell*, 1 Ba. & Be. 449; *Odell* v. *Crone*, 3 Dow. 61; *Holland* v. *Wood*, L. R. 11 Eq. 91; *Re Pilkington*, 29 L. R. Ir. 370.

(*p*) *Ayton* v. *Ayton*, 1 Cox, 327. *Ellison* v. *Airey*, 1 Ves. sen. 111.

(*q*) *Walker* v. *Shore*, 15 Ves. 122. The rule also applies to appointments under powers: *Harvey* v. *Stracey*, 1 Dr., at p. 126. See *ante*, p. 831.

(*r*) *Att.-Gen.* v. *Crispin*, 1 B. C. C. 386; *Devisme* v. *Mello*, *ib.* 537; *Middleton* v. *Messenger*, 5 Ves. 136; *Cooke* v. *Bowen*, 4 Y. & C. 244; *Watson* v. *Watson*, 11 Sim. 73; *Locker* v. *Bradley*, 5 Bea. 593; *Salmon* v. *Green*, 13 Jur. 272; *Evans* v. *Jones*, 2 Coll. pp. 516, 524; *Pattison* v. *Pattison*, 19 Bea. 638. Compare the cases on gifts to issue, *ante*, p. 1567. And as an instance where the rule was excluded by the context, see *Spencer* v. *Bullock*, 2 Ves. jun. 687.

tives (*r*); though the rule is sometimes inaccurately stated, as if existence at the period of distribution was essential (*s*).

Construction applicable to *executory* gifts.

"The preceding rule of construction applies not only where the future devise (*i.e.*, future in enjoyment) consists of a limitation of real estate by way of remainder, or a corresponding gift of personalty (of which there cannot be a remainder, properly so called), but also to executory gifts made to take effect in defeasance of a prior gift. Therefore, if a legacy be given to B. son of A., and, if he shall die under the age of twenty-one, to the other children of A., it is clear that on the happening of the contingency all the children who shall *then* have been born (including, of course, the children, if any, who may have been living at the testator's death,) are entitled (*t*). The principle, indeed, seems to extend to every future limitation." Thus if there is a gift to the testator's grandchildren, to be divided among them at the end of twenty years after the testator's death, this gives vested interests to the grandchildren living at the testator's death, subject to the class being opened to let in grandchildren born before the expiration of the twenty years (*u*).

This rule is applicable where there is an object *in esse* at the time when the anterior gift determines. If there is no such object a different rule prevails (*x*).

The effect of a gift in remainder to children who attain a certain age, is considered in the next Section.

Where gift to class does not fit prior limitation.

Reference should here be made to the case (of not infrequent occurrence) where the limitation of the particular estate or interest and the limitation in remainder are not consistent: as where a testator gives property to his wife during widowhood with remainder to a class of persons who shall be living at her death, without providing for the event of her remarriage. In such a case the general rule is that, if the widow marries again, the class is ascertained at the date of her marriage and the gift takes effect immediately (*y*).

Effect of gift over.

It is generally considered that the narrow doctrine laid down in *Davidson* v. *Dallas* (*z*) applies to gifts to children following

(*s*) See judgment in *Matthews* v. *Paul*, 3 Sw., at p. 339; *Houghton* v. *Whitgreave*, 1 J. & W. at p. 150. See also *Crooke* v. *Brookeing*, 2 Vern. 106; *Baldwin* v. *Karver*, Cowp. 309.

(*t*) *Haughton* v. *Harrison*, 2 Atk. 329; *Ellison* v. *Airey*, 1 Ves. sen. 111; *Stanley* v. *Wise*, 1 Cox, 432; *Baldwin* v. *Rogers*, 3 D. M. & G. 649.

(*u*) *Oppenheim* v. *Henry*, 10 Hare, 441. Gray on Perp. pp. 95, 481. As to the effect of directing postponement of payment beyond the age of twenty-one, see *Kevern* v. *Williams*, 5 Sim. 171; *ante*, p. 303, and *post*, p. 1654

(*x*) *Post*, p. 1663, and *ante*, p. 1638.

(*y*) *Stanford* v. *Stanford*, 34 Ch. D. 362; *Re Tucker*, 56 L. J. Ch. 449; *Re Dear*, 58 L. J. Ch. 659; *Bainbridge* v. *Cream*, 16 Bea. 25; *ante*, p. 1366.

(*z*) *Ante*, p. 1639, note (*s*).

a life estate, and that consequently a gift over in case of the death of any of the children under age does not affect the rule of construction. If this is so, the class is ascertained at the death of the tenant for life. But the case which is usually cited in support of this proposition (*a*) is not a very satisfactory one (*b*), and in *Re Smith* (*c*), where there was a gift to children preceded by a life interest, and followed by a gift over on the death of children under twenty-one, it seems to have been taken for granted that all children born before the eldest child attained that age were entitled, subject to their attaining twenty-one (*d*). Mr. Jarman's criticism of *Davidson* v. *Dallas* (*e*) is equally applicable to *Berkeley* v. *Swinburne* (*f*), but if *Davidson* v. *Dallas* is good law, it seems difficult to contend that *Berkeley* v. *Swinburne* is wrong.

Gift over on bankruptcy.

Where the prior estate determines by bankruptcy or some other event, the class must as a general rule be ascertained at the time of the determination of the estate (*g*). But if there is a gift to A for life and after his death to his children, with a proviso that in the event of his becoming bankrupt or alienating his life interest, then his interest shall cease as if he were dead, or to the like effect, the proviso does not, as a general rule, disturb the previous gift: consequently all the children, living at A's death, including those born after the bankruptcy, are entitled (*h*).

Where prior interest revoked.

If a testator revokes a life interest given by his will, so as to accelerate the period of distribution, the class will, as a general rule, be ascertained at the testator's death, or whatever the new period of distribution may be (*i*).

(*a*) *Berkeley* v. *Swinburne*, 16 Sim. 275.

(*b*) See *Re Emmet's Estate*, 13 Ch. D. 484.

(*c*) 2 J. & H. 594.

(*d*) It was stated in the 4th and 5th editions of this work that no child was, in fact, born between the determination of the life estate and the eldest child's majority, and that consequently the point did not arise, but this is not quite accurate; the dates of the younger children's births had not been proved, and an inquiry was directed as to this.

(*e*) *Ante*, p. 1639, note (*s*).

(*f*) 16 Sim. 275.

(*g*) The general doctrine is laid down in *Re Smith*, 2 J. & H. 594 (where *Brandon* v. *Aston*, 2 Y. & C. C. C., at p. 30, is referred to); *Re Aylwin's Trusts*, L. R. 16 Eq., at p. 590; *Re Curzon*, 56 Sol. J. 362.

(*h*) See *Re Bedson's Trusts*, 28 Ch. D. 523; *Blackman* v. *Fysh*, [1892] 3 Ch. 209. In both these cases and also in *Re Smith*, the gift was to children who attained twenty-one, but the principle seems to be the same. Some observations on *Re Bedson's Trusts* will be found *infra*. In *Donohoe* v. *Mooney*, 27 L. R. Ir. 26, the tenant for life was unmarried when the forfeiture took place, and it was held that the interim income fell into residue.

(*i*) *Re Johnson*, 68 L. T. 20. See *Eavestaff* v. *Austin*, 19 Bea. 591. In *Re Johnson*, the gift was of real estate, but the principle seems to apply to personalty.

Contrary intention.

But the general rule that a class is to be ascertained at the period of distribution will yield to an indication of a contrary intention (*k*). Thus in *Goodier* v. *Johnson* (*l*) the testator directed his trustees after the death of the longest liver of certain persons, to sell his real estate and to stand possessed of the proceeds upon trust for the children of his son and daughter and the issue "of such of them as may then be dead leaving issue, such issue to be entitled to no more than their parent or respective parents would have been if living." It was held by the Court of Appeal that the gift was not to a class composed of the children and their issue living at the period of distribution (*m*), but that the first part of the gift was to all the children, and that the gift to the issue of deceased children was substitutional.

Where partial life interest is given.

Where an annuity or similar life interest is given which does not exhaust the whole income, and the property itself is given to children as a class subject to the annuity, etc., the general rule is that the class is to be ascertained at the death of the testator. As regards real estate Mr. Jarman states the rule thus (*n*): "The subjecting of lands devised to trusts for partial purposes, as the raising of money, payment of annuities, or the like, by which the vesting in possession is not postponed, does not let in children born during the continuance of those trusts." For this proposition he cites *Singleton* v. *Gilbert* (*o*), where A. devised her real estate to trustees for 500 years, to raise £200, and then to other trustees for 1,000 years, out of the rents to pay the interest thereof, and certain life annuities; and, subject to the said terms, she gave the estate to all and every the child and children of her brother T. in tail, as tenants in common; it was held that a child born after the death of A., but in the lifetime of the annuitants, could not take jointly with two others born before A.'s death.

Mere charging of lands does not let in future children.

Same construction as to charge on personal estate.

The same rule is applicable to personal estate; so that where a testator directs that a particular sum shall be set apart for a temporary purpose (as a life-annuity), and that it shall afterwards fall into the residue, and the residue is bequeathed to the children of A, those children who are in existence at the time

(*k*) Vague expressions are not sufficient to exclude the rule; *Middleton* v. *Messenger*, 5 Ves. 136.

(*l*) 18 Ch. D. 441.

(*m*) In that case the gift would have been bad for remoteness, as the property was not distributable until after the death of a person who might be unborn at the testator's death. At it was, the gift to the children was good, and the trust for sale being bad, the property devolved as realty: *Goodier* v. *Edmunds*, [1893] 3 Ch. 455.

(*n*) First ed., Vol. II, p. 77.

(*o*) 1 Cox, 68.

of the testator's death are alone entitled to the particular sum (subject to the temporary purpose), as well as the residue (*p*).

And the rule applies where part of the residue is subject to a life interest and part to a trust for accumulation for a term of years (*q*).

Whether the construction applies when funds are treated as distinct.

The result might be different if the context showed an intention to treat the funds separately. As an example of such treatment, though not involving the exact point in question, reference may be made to *King* v. *Cullen* (*r*), where a testator directed a fund to be set apart to answer an annuity for his wife, for her life; at her death to sink into the residue; and bequeathed the residue to his children as tenants in common; provided that in case any of them should die [either in his lifetime or after his decease, before their shares should become vested interests] (*s*) leaving issue, such issue should have their parents' share. One of the children who survived the testator died in the widow's lifetime, leaving a daughter; and Sir J. K. Bruce, V.-C., held that although the deceased child took absolutely such part of the residue as was not set apart for the annuity, yet her share in the fund that was so set apart went to her daughter. The ground of this decision would seem to have been that by no other construction could the gift over have any operation, since no child could die *after the testator's decease* without attaining a vested (*t*) interest in the general residue.

Where residue is given "after the decease" of annuitants, etc.

Where a testator gives life interests in part of his property or annuities to various persons and "after their decease" gives all his residue to children as a class, the class must, it seems, be ascertained at the testator's death, the words "after their decease" are equivalent to saying "subject to their interests," for there is no tenant for life of the residue, and it is not to be supposed that the testator intended that there should be an intestacy during the lifetime of the annuitants, etc. (*u*). Bacon, V.-C., refused to apply this principle in *Re Hiscoe* (*x*), where a testator gave certain annuities, and directed his trustees, "from and after the determination of the estates and interests hereinbefore limited and given," to divide the residue among the

(*p*) *Hill* v. *Chapman*, 3 B. C. C. 391, 1 Ves. jun. 405; *Hagger* v. *Payne*, 23 Bea. 474; see *Cort* v. *Winder*, 1 Coll. 320; *Middleton* v. *Messenger*, 5 Ves. 136.

(*q*) *Coventry* v. *Coventry*, 2 Dr. & Sm. 470.

(*r*) 2 De G. & S. 252. See also *Gardner* v. *James*, 6 Bea. 170, where distribution was by the will expressly postponed.

(*s*) The words in brackets were held to be imported into this clause from the preceding clause, which provided for the case of children dying without issue.

(*t*) The word "vested" was held to mean *vested in possession*, on the same ground.

(*u*) *Lill* v. *Lill*, 23 Bea. 446; *Bortoft* v. *Wadsworth*, 12 W. R. 523.

(*x*) 48 L. T. 510.

testator's grandchildren; it was held that the class must be ascertained on the death of the last surviving annuitant. The accuracy of the decision may be questioned, notwithstanding the definite language of the will.

Gift to children "then living," or to children of person "then dead."

(D) *Gift to Children "then living."*—Hitherto we have considered those cases in which the gift is to a person for life, and after his death to children as a class, without more. It is now necessary to consider what is the effect of adding to the gift to the children the requirement that they shall be "then living" or that their parent shall be "then dead" (*y*).

Literal construction.

If the language of the will is clear, effect must be given to it, although the probable intention is thereby defeated. Thus in *Ex p. Hunter* (*z*) a testator gave property to his wife for life and after her decease to such of his children as should be then living, and if any of his "said children" died leaving lawful issue such issue should take their parent's share: only one child, a son, survived the wife, but a daughter, who predeceased her, left issue: it was held that the son took the whole. In *Olney* v. *Bates* (*a*) a testator gave property to his wife for life, and after her death to his children, but if any of them should be then deceased, leaving issue, the deceased child's share was to be given to such issue. The widow died before the testator; one of the testator's daughters survived her and predeceased the testator, leaving issue: it was held that they did not take their mother's share. Again it may happen that a testator gives a life interest to A, and after A's death bequeaths the property to B "if he shall be then living" and if not then to C, and omits to provide for the event of B surviving A, and of both A and B dying in his (the testator's) lifetime (*b*); in such a case the Court is unable to avoid a literal construction of the will, although the result is that the gifts to B and C both fail. In the cases above referred to, the literal construction put upon the words "then living" often defeats the intended gift to C. The Court therefore endeavours to avoid such a construction if

Where meaning of "then living" is ambiguous.

(*y*) If there is no prior life estate, and the gift is to children on their attaining twenty-one, the words "then living" may refer to the date when the eldest attains twenty-one: *Hilliard* v. *Fulford*, 42 L. J. Ch. 624.

(*z*) 3 Y. & C. 610; *Laroche* v. *Davies*, 1 Jur. 574; *Howes* v. *Herring*, 1 M'Cl. & Y. 295. But would this strictness of construction be followed at the present day? In *Jeyes* v. *Savage*, L. R. 10 Ch. 555, the Court refused to put on the word "such" a construction which was inconsistent with the scheme of the settlement. See also *Duffield* v. *M'Master*, [1906] 1 Ir. R. 333.

(*a*) 3 Drew. 319. The same construction was followed in *Re Milne*, 57 L. T. 828, with the result that there was an intestacy. See also *Powis* v. *Matthews*, 11 W. R. 662, and *Sprackling* v. *Ranier*, 1 Dick. 344, which seems to have turned on this point, although commonly cited in support of a different principle, *post*, p. 1670.

(*b*) *Williams* v. *Jones*, 1 Russ. 517, was a case of this kind.

possible, and if the word "then" does not clearly refer to any particular time, the presumption seems to be that it is meant to refer to the period of distribution. Thus, where a testator gave a legacy to A, his daughter, for life, and after her death to his grandson B; and if he should die in the lifetime of A, then to the children of C who should be then living; B died in A's lifetime: it was held that the bequest was confined to the children of C living at the death of A, and that the point was so clear, that the costs of the suit occasioned by the refusal of the executor to pay the legacy without the opinion of the Court, must fall on himself (*c*).

Where strict construction would defeat intention.

And the Court will strive to avoid putting a strict construction on the expression "then living" or "then dead" if it is inconsistent with the general scheme of the will (*d*). Thus in *Gaskell* v. *Holmes* (*e*) a testator gave his residue to his son absolutely, but if his son should die under twenty-one without issue, the testator gave the same to his wife during widowhood, with remainder as she should by will appoint, and in default of appointment, or in case she should marry again after the testator's decease, he directed that from and after her second marriage or decease, which should first happen, a moiety of the trust estate should be held in trust for the daughters who should be then living of his sister Mary Miles, and the issue then living of the issue of them as should be then dead, equally amongst them *per stirpes*. The testator's son died under twenty-one, without issue, in the testator's lifetime, and the testator's wife also died in his lifetime. A daughter of Mary Miles was living at the death of the testator's wife, but died in the lifetime of the testator, leaving issue: it was held by Wigram, V.-C., that the testator's death was the period at which the persons entitled under the residuary gift were to be ascertained, and that consequently the issue of the deceased daughter were entitled to the share which their parent would have taken if living (*f*).

(*c*) *Harvey* v. *Harvey*, 3 Jur. 949; *Hetherington* v. *Oakman*, 2 Y. & C. C. C. 299; *Gill* v. *Barrett*, 29 Bea. 372; *Widdicombe* v. *Muller*, 1 Dr. 443; *Cormack* v. *Copous*, 17 Bea. 397; *Coulthurst* v. *Carter*, 15 Bea. 421.

(*d*) As to the importance of considering the general scheme of a will in cases of this kind, see *Heasman* v. *Pearse*, L. R. 7 Ch. 275, and *Cooper* v. *Macdonald*, L. R. 16 Eq. 258.

(*e*) 3 Ha. 438.

(*f*) Compare *Re Deighton's Settled Estates*, 2 Ch. D. 783, where a literal construction of the words "then living" would have led to absurd results. In *Heasman* v. *Pearse*, L. R. 7 Ch. 275, there was no question that in the gift of an original share to the issue of A, the words "then living" referred to the period of distribution; the difficulty was that the same words, which occurred in the gift of an accruing share to the issue of A, if taken literally, referred to another period; it was held by the C. A. that the same class of issue was entitled under both gifts, as "it would be most unreasonable and almost absurd" to give the words a different meaning in the two clauses.

Whether "then living" applies to whole class.

In *Turner* v. *Hudson* (*g*) property was given to A for life and after her death to the testator's brothers and sisters and such of their children as should be then living; it was held that the qualification of surviving A applied to the brothers and sisters as well as their children. But this construction would not be adopted if the brothers and sisters were referred to by name (*h*).

Stirpital construction of "then living."

In *Cooper* v. *Macdonald* (*i*) a testator made a series of specific devises upon trust for each of his sons and daughters *nominatim* for life, with remainder to the children of each as tenants in common in tail with cross remainders between them, and failing such issue, in trust for the testator's other children equally as tenants in common in tail, or if there should be only one of his said children "then living," in trust for that child and the heirs of his or her body; he afterwards gave his residuary real and personal estate upon such trusts as should correspond with those declared concerning the estates specifically devised. It was held by Lord Selborne, L.C., that the true construction of the words "then living" was a stirpital construction, so that the limitation in question was to be read thus: "failing such issue of my said son C in trust for my other children, who, or the heirs of whose bodies may be living at the time of such failure of issue."

"Then surviving."

In *Re Coulden* (*k*) the testator in effect directed that on the death of A his property should be equally divided amongst "my then surviving children and their respective issue": it was held that the property was divisible into as many shares as there were children who either survived A or died before him, leaving issue who so survived; that each surviving child took one share, and that the surviving issue of each child who predeceased A took the share which their parent would have taken if he had survived.

Where several life interests are given, "then" refers to immediate antecedent.

It sometimes happens that the words "then living" are ambiguous by reason of life interests being given to two or more persons. The general rule in such cases is thus stated by Mr. Jarman (*l*): "Where (as often occurs) life interests are bequeathed to several persons in succession, terminating with a gift to children, or any other class of objects *then* living, the word 'then' is held to point to the period of the death of the person last named (whether he is or is not the survivor of the

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(*g*) 10 Bea. 222.

(*h*) *Cormack* v. *Copous*, 17 Bea. 397. Compare *Leader* v. *Duffey*, 13 A. C. 294 (settlement; "grandchildren or other issue then in being").

(*i*) L. R. 16 Eq. 258. See *Re Firth*, [1914] 2 Ch. 386, at p. 391.

(*k*) [1908] 1 Ch. 320.

(*l*) First ed., Vol. I, p. 768 (note (*k*)), where the passage formed part of the chapter on Devises and Bequests, whether Vested or Contingent (now Chap. XXXVII). Mr. Jarman's statement of the rule has been frequently approved; see *Re Milne*, 57 L. T. 828; *Palmer* v. *Orpen*, [1894] 1 Ir. R. 32.

several legatees for life), and is not considered as referring to the period of the determination of the several prior interests (*m*)."

Where gift is substitutional.

The same principle applies when the gift to children is substitutional. Thus in *Hodgson* v. *Smithson* (*n*) the gift was to A for life and after her decease to B or in case of her decease to be "equally divided between her children living": B died in the testator's lifetime and her only child, who survived the testator, died in A's lifetime: it was held that "living" referred to the last antecedent, and that the personal representatives of the child were entitled to the legacy.

Rule where distribution is postponed till a given age.

(E) *Where Distribution is postponed till a given Age.*—Mr. Jarman continues (*o*): "It has been also established, that where the period of distribution is postponed until the attainment of a given age by the children, the gift will apply to those who are living at the death of the testator, and who come into existence before the first child attains that age, *i.e.* the period when the fund becomes distributable in respect of *any* one object, or member of the class (*p*). And the result is the same where the expression is '*all* the children' (*q*).

Does not clash with the preceding rules.

"This rule of construction must be taken in connection with, and not as in any measure intrenching upon the two preceding rules. Thus, where a legacy is given to the children, or to all the children, of A, *to be payable at the age of twenty-one*, or to Z for life, and after his decease to the children of A, *to be payable at twenty-one*, and it happens that any child in the former case at the death of the testator, and in the latter at the death of Z, have attained twenty-one, so that his or her share would be immediately payable, no subsequently born child will take; but if at the period of such death no child should have attained twenty-one, then all the children of A who may subsequently come into existence before one shall have attained that age will be also included (*r*).

Ascertainment of class not accelerated by advancement out of children's shares.

"And the construction is not varied by the circumstance of the trustees being empowered to apply all or any part of the

(*m*) *Archer* v. *Jegon*, 8 Sim. 446; *Powis* v. *Matthews*, 11 W. R. 662; *Re Wollaston's Settlement*, 27 Bea. 642; *Cain* v. *Teare*, 7 Jur. 537; *Palmer* v. *Orpen*, [1894] 1 Ir. R. 32.

(*n*) 21 Bea. 354; 8 D. M. & G. 604.

(*o*) First ed., Vol. II, p. 78. See Astbury, J.'s, statement quoted above, p. 1639.

(*p*) *Ellison* v. *Airey*, 1 Ves. sen. 111; *Congreve* v. *Congreve*, 1 Br. C. C. 530; *Gilmore* v. *Severn*, 1 Br. C. C. 582; *Hoste* v. *Pratt*, 3 Ves. 730; *Barrington* v. *Tristram*, 6 Ves. 345; *Pearse* v. *Catton*, 1 Bea. 352; *Blease* v. *Burgh*, 2 Bea. 221; *Mower* v. *Orr*, 7 Hare, 473; *Hagger* v. *Payne*, 23 Bea. 474. And see as to *income*, *post*, p. 1661.

(*q*) *Whitbread* v. *Lord St. John*, 10 Ves. 152.

(*r*) *Clarke* v. *Clarke*, 8 Sim. 59. See also *Matthews* v. *Paul*, 3 Sw. 328; *Robley* v. *Ridings*, 11 Jur. 813; *Gillman* v. *Daunt*, 3 K. & J. 48; *Re Emmet's Estate*, 13 Ch. D. 484.

shares of the children for their advancement before the distribution (the word 'shares' being considered as used in the sense of '*presumptive* shares' (*s*)); nor is any such variation produced by a clause of accruer, entitling the survivors or a single survivor, in the event of the death of any or either of the children, as the expression 'said children,' so occurring, means the children designated by the prior gift, whoever they may be, and is therefore, applicable no less to an after-born child, whom the ordinary rule of construction admits to be a participator, than to any other (*t*).

Judicial opinions upon rule.

"The rule in question, as it respects the exclusion of children, born after the vesting in possession of *any* of the shares, has been viewed with much disapprobation; and Lord Thurlow, in *Andrews* v. *Partington* (*u*), said, he had often wondered how it came to be so decided; there being no greater inconvenience in the case of a devise than in that of a marriage settlement, where nobody doubts that the same expression means all the children (*x*). In marriage settlements, however, one at least of the parents generally takes a life interest, so that the shares do not vest in possession until the number of objects is fixed. The rule has gone, Lord Eldon remarked (*y*), upon an anxiety to provide for as many children as possible with convenience. Undoubtedly it would be very inconvenient, especially in the case of legacies payable *instanter*, if the shares of the children were, by reason of the possible accession to the number of objects by future births, unascertainable during the whole life of their parent; and though this inconvenience is actually incurred, as we shall presently see, in some cases (*z*), in which the gift runs through the whole line of objects, born and unborn, even after vesting in possession in the existing children, yet it will be found in such cases either that the construction was adopted *ex necessitate rei*, (there being no alternative but either to admit *all* the children, or hold the gift to fail *in toto* for want of objects,) or, that the admission of all the children was compelled by some expressions of the testator.

(*s*) *Titcomb* v. *Butler*, 3 Sim. 417. Mr. Jarman means, of course, that a power of advancement will not hasten the ascertainment of the class. As to the effect of such a clause in postponing the ascertainment of the class, see below, p. 1660.

(*t*) *Balm* v. *Balm*, 3 Sim. 492: cf. *Matchwick* v. *Cock*, 3 Ves. 609; *Freemantle* v. *Taylor*, 15 *ib.* 363.

(*u*) 3 B. C. C. 401. See also *per* Lord Rosslyn, *Hoste* v. *Pratt*, 3 Ves. at p. 732; *per* K. Bruce, V.-C., *Brandon* v. *Aston*, 2 Y. & C. C. C., at p. 30; *Darker* v. *Darker*, 1 Cr. & M. 850.

(*x*) In *Re Knapp's Settlement*, [1895] 1 Ch. 91, North, J., held that the rule in *Andrews* v. *Partington* applies to a voluntary settlement.

(*y*) In *Barrington* v. *Tristram*, 6 Ves., at p. 348.

(*z*) See *post*, pp. 1658, 1659.

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Share vesting on marriage.

"The principle of the rule under consideration seems to apply to all cases in which the shares of the children are made to vest *in possession* on a given event, as on marriage; in which case the marriage of the child who happens to marry first, is the period for ascertaining the entire class" (*a*).

Part of fund falling into possession.

In *Re Faux* (*b*) the testator gave his residuary estate upon trust as to half of the income to A for life and the other half of the income to B for life and subject thereto the capital for all the children of A and B who being sons should attain twenty-one or being daughters should attain that age or marry. A and B each had two infant children. In 1889 A died and his eldest son attained twenty-one in 1912; the other three children were infants. Held that the child who had attained twenty-one was not entitled to call for the payment of his share until the death of B and that the class was not closed until B's death.

Where gift is contingent.

When the shares are not to vest until the period of distribution, all children, born before the eldest acquires a vested interest,—which he does upon the happening of the contingency as to him individually,—may by possibility be participators in the fund (*c*). Younger children as to whom the contingency has not happened are, of course, not entitled to anything while the contingency is in suspense: it is uncertain, therefore, by how many the class ultimately entitled may fall short of the number of children living when the contingency happens as to the eldest; but as the class cannot, in consequence of the application of the rule, be enlarged, the minimum of each share is immediately fixed.

Where rule not applicable.

The general rule is, of course, not applicable in cases where the testator expresses an intention to include all the children whenever born (*d*), nor (it seems) is it applicable if there is no child in existence at the death of the testator (*e*).

Where there is a prior life interest determinable on bankruptcy.

It sometimes happens that a testator gives property to A during his life until he shall become bankrupt or alienate his interest, and then to his children who attain twenty-one: in

(*a*) See *Andrews* v. *Partington*, 3 Br. C. C. 401 (shares payable at twenty-one or marriage); *Prescott* v. *Long*, 2 Ves. jun. 690; *Pulsford* v. *Hunter*, 3 Br. C. C. 416 (commented on in *Fox* v. *Fox*, L. R. 19 Eq. 286); *Blease* v. *Burgh*, 2 Bea. 221; *Dawson* v. *Oliver-Massey*, 2 Ch. D. 753.

(*b*) 113 L. T. 81; *Re Emmet's Estate*, 13 Ch. D. 484; *Re Paul's Settlement Trusts*, [1920] 1 Ch. 99.

(*c*) *Clarke* v. *Clarke*, 8 Sim. 59; *Gillman* v. *Daunt*, 3 K. & J. 48; *Locke* v. *Lamb*, L. R. 4 Eq. 372.

(*d*) See *Mainwaring* v. *Beevor*, 8 Ha. 44, *post*, p. 1659; *Scott* v. *Scarborough*, 1 Bea. 154, *post*, p. 1672. In *Ellis* v. *Maxwell*, 12 Bea. 104, the terms of the will were unusual. A gift to *all* the children, as already mentioned, does not, of itself, prevent the application of the rule, *ante*, p. 1650. As to the effect of the words "then living" in a gift to children on attaining twenty-one, see *Hilliard* v. *Fulford*, 42 L. J. Ch. 624.

(*e*) *Post*, p. 1663.

such a case, if A's eldest child attains twenty-one before A's life interest determines, the class is closed, when the forfeiture takes place, and no children born afterwards will be included: if A's eldest child attains twenty-one after the forfeiture, children born in the meantime are included, subject to their attaining twenty-one (*f*).

But the interests of the children are not generally made to take effect in this manner: the usual way is to give a determinable life interest to A, with a gift to the children on his death, and a declaration that in the event of his life interest being determined during his life the income shall be applied in the same manner as if he were dead. If the clause is properly drawn, no question can arise: otherwise it may cause difficulties. Thus, in *Re Bedson's Trusts* (*g*), a testator gave a fund upon trust for A during his life, and after his death for his children at twenty-one, with a proviso that if A should become bankrupt the fund and the income thereof should thenceforth immediately go and be payable or applicable to or for the benefit of his children in the same manner as if he was naturally dead. After the death of the testator A was adjudicated bankrupt; at that time (1865) he had two children, the elder of whom was born in 1862; after the adjudication he had four other children, all born before 1883, when the eldest child attained twenty-one. It was held by Pearson, J., that all six children were entitled to share, subject to their attaining twenty-one, and his decision was affirmed by the Court of Appeal, but it is not very easy to say on what ground the decision proceeded; none of the Judges seem to have attached any importance to the dates of the births of the children. Cotton and Lindley, L.JJ., both said that the period of distribution was not the bankruptcy, but the death of the son, although to arrive at this result it was necessary to ignore the testator's express declaration that on A's bankruptcy the capital of the fund was to go as if he was then dead. In *Blackman* v. *Fysh* (*h*), a testator devised realty to his son for life, and after his death to all the children of the son, born or to be born, who should attain twenty-one, with a clause directing that if the son's interest should be taken in execution the devise to him should become void and cease as if he were then dead, and the land should vest in the persons "who, under the devises

Re Bedson's Trusts.

Blackman v. Fysh.

(*f*) This appears to be the principle laid down in *Re Smith*, 2 J. & H. 594, in which case Wood, V.-C., remarked that the decision in *Brandon* v. *Aston*, 2 Y. & C. C. C. 24, seemed to have turned on special circumstances. As to the point decided in *Re Smith*, see *ante*, p. 1644, note (*h*). Compare *Re Aylwin's Trusts*, L. R. 16 Eq. 585, where, however, the gift was to the children irrespective of age; and *Re Curzon*, 56 Sol. J. 362.

(*g*) 25 Ch. D. 458; 28 Ch. D. 523.

(*h*) [1892] 3 Ch. 209.

and limitations hereinbefore contained would be next entitled thereto." The son's life interest having been forfeited, it was held by Kekewich, J., and by the C. A., that the limitations to the children were executory devises, and, by virtue of the words last above quoted, took effect in favour of all the children, whether born before or after the forfeiture, who attained twenty-one.

Re Canney's Trusts.

In *Re Canney's Trusts* (*i*) the testatrix appointed real estate in trust for her husband for life with remainder in trust for A, the wife of B, during her life or widowhood, and after her decease or remarriage upon trust for all and every the children of B on attaining twenty-one, or, in the case of daughters, previously marrying. The husband died; then A died; at her death there were four children of her marriage with B, all of whom had attained twenty-one. It was held (applying the rule stated by Jessel, M.R., in *Re Emmet's Estate* (*j*)), that these four children were alone entitled to the exclusion of after-born children of B by any future marriage. This shows that *Blackman* v. *Fysh* (*k*) does not affect the settled rule.

Construction not varied though it leads to remoteness.

Gift to A for life, remainder to grandchildren of B, payable at twenty-five; class held ascertainable at death of A.

The foregoing rules, which admit all children coming *in esse* before the period of vesting or of possession, will (like other rules of construction) be generally adhered to, although the gift may in consequence fail for remoteness, as, where the gift is to the children of a living person to vest at the age of twenty-two (*l*). But if a distinct vested gift be followed by a direction postponing distribution beyond the legal period, the direction will be rejected as void, and the gift left intact, as in *Kevern* v. *Williams* (*m*), where a testator bequeathed the residue of his personal estate in trust for A for life, with remainder to the grandchildren of B, "to be by them received in equal proportions when they should severally attain the age of twenty-five years." On the question of remoteness being raised, it was held by Sir L. Shadwell, V.-C., that the grandchildren who had come *in esse* before A's death were alone entitled. He distinguished *Leake*

(*i*) 101 L. T. 905. See also *Re Johnson*, 111 L. T. 130 (perpetuity).

(*j*) 13 Ch. D., at p. 490.

(*k*) [1892] 3 Ch. 209.

(*l*) *Leake* v. *Robinson*, 2 Mer., pp. 363, 383; *Arnold* v. *Congreve*, 1 R. & My. 209; *Comport* v. *Austen*, 12 Sim. 218; *Boughton* v. *James*, 1 Coll., at p. 43; 1 H. L. C. 406. See *Pearks* v. *Moseley*, 5 A. C. 714, 719; *Re Mervin*, [1891] 3 Ch. 197. If any one of the class has attained the age in the testator's lifetime, the gift is good, because no after-born child is admissible: *Picken* v. *Matthews*, 10 Ch. D. 264. And distinguish the case of a share being vested, subject to being divested on the death of the child under twenty-five, as in *Re Turney*, [1899] 2 Ch. 739. The subject is discussed more in detail, *ante*, pp. 300 *seq.*

(*m*) 5 Sim. 171, cited 16 Sim. 285. See now section 163 of the Law of Property Act, 1925.

v. *Robinson* because there the time of gift was not distinct from the time of enjoyment (*n*).

Gift to children of A at twenty-two, held to include children living at testator's death only.

In *Elliott* v. *Elliott* (*o*), a strained construction was put upon the words of the will in order to prevent the gift from failing by remoteness. In that case there was a residuary bequest to the children of A, "as and when they should attain their respective ages of twenty-two years," and the testator directed the interest on their respective shares to be accumulated and to be paid to them as and when the principal should be payable; it was argued that the gift being contingent was void for remoteness; but Shadwell, V.-C., said that he saw no objection, "in principle," to holding that by this description the testator meant those children who were then living or might be living at his death; and then there was no objection to the gift. It has been suggested that the direction as to interest showed an intention to make the children's shares vested on the testator's death. Unless the decision can be justified on this ground, it seems wrong (*p*).

Where class ascertained at testator's death.

It will be remembered that if there is an immediate gift to the children of A who attain an age exceeding twenty-one, and at the death of the testator one of the children has attained the prescribed age, the class is closed, and the gift is consequently good (*q*).

Exception as to general legacies.

An important exception to the general rule obtains in the case of legacies which are to come out of the general personal estate, and are made payable at a given age (say twenty-one); as where a legacy of £1,000 is given to each of the children of A, payable on attaining twenty-one years. In such a case the bequest is confined to children in existence at the death of the testator, on account of the inconvenience of postponing the distribution of the general personal estate until the majority of the eldest legatee, which would be the inevitable effect of keeping

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(*n*) This paragraph is reprinted verbatim from the 4th ed. of this work by Mr. Vincent (Vol. II, p. 162). The question whether *Kevern* v. *Williams* was rightly decided, and if so on what principle, is discussed by Mr. Gray (Rule against Perpetuities (§§ 638 *seq.*)). Mr. C. Sweet's view was that as a direction postponing enjoyment of a vested interest beyond the age of twenty-one is void (*Rocke* v. *Rocke*, 9 Bea. 66; *Saunders* v. *Vautier*, Cr. & Ph. 240); the gift in *Kevern* v. *Williams* was in effect simply a gift to A for life with remainder to the grandchildren of B.

(*o*) 12 Sim. 276; followed by Stirling, J., though with some doubt, in *Re Coppards' Estate*, 35 Ch. D. 350.

(*p*) See the remarks of Chitty, J., in *Re Wenmoth's Estate*, 37 Ch. D., at p. 269, and of Stirling, J., in *Re Mervin*, [1891] 3 Ch., at p. 200, and of Joyce, J., in *Re Barker*, 92 L. T., at p. 831.

(*q*) *Picken* v. *Matthews*, 10 Ch. D. 264, *ante*, p. 1654, where the effect of a substitutional gift to the issue of deceased children is also considered.

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open the number of pecuniary legatees (*r*). If there is no child in existence at the testator's death, the legacies fail altogether (*s*). But this argument of inconvenience, it is obvious, does not apply where the number of objects affects the *relative* shares only, and not the aggregate amount (*t*), nor where a definite sum is directed to be set apart to answer the legacies, and the legacies are to come only out of that sum (*u*). And, of course, the testator may so clearly express his intention of including all the children, whenever born, that effect must be given to it. As in *Defflis* v. *Goldschmidt* (*v*), where the testator gave a legacy of £2,000 to each of his sister's children, "now born or hereafter to be born," payable at twenty-one, and directed his executors to appropriate a sufficient fund to meet the legacies as they became due, and to pay the income to his sister in the meantime, and in case she died before all her children attained twenty-one or married, the income was to be applied for the benefit of the infant children: it was held that all the children of the sister were included.

Defflis v. *Goldschmidt.*

Cases in which the rule has been departed from.

Mr. Jarman continues (*w*): "The rule in question, so far as regards the exclusion of children born after the vesting in possession of any one of the distributive shares, has been sometimes departed from upon grounds which can scarcely be considered as warranting that departure. Thus, where (*x*) a testator bequeathed £300 to the children of his sister S., to be equally divided *at their respective ages of twenty-one or marriage*, with interest, and failing the share of any, to the survivors, and failing the share of *all*, then to G. One of the questions was, whether the legacy belonged to a child of S. born at the making of the will, to the exclusion of those since born, or to be born? Lord Hardwicke thought it was meant for the benefit of *all the children S. should have*; for the testator, knowing she had but one then, had yet given it to *children*, had pointed out survivors, and given it over to another branch of the family, which he could not mean, till all failed.

Remark on *Maddison* v. *Andrew.*

"It is clear that none of these circumstances would now be held to take the bequest out of the ordinary rule. Its being to

(*r*) *Ringrose* v. *Bramham*, 2 Cox, 384; *Peyton* v. *Hughes*, 7 Jur. 311; *Mann* v. *Thompson*, Kay, 638. And see *Storrs* v. *Benbow*, 2 My. & K. 46.

(*s*) *Rogers* v. *Mutch*, 10 Ch. D. 25.

(*t*) *Gilmore* v. *Severn*, 1 B. C. C. 582.

(*u*) *Evans* v. *Harris*, 5 Bea. 45. But until the number of legatees is finally ascertained, there is always a possibility of the fund proving deficient. As to abatement in such a case *vide ib.* and 19 Ves., p. 570.

(*v*) 1 Mer. 417. But the general principle is inaccurately stated by Sir W. Grant, and the authority of the decision is proportionately lessened: see *Butler* v. *Lowe*, 10 Sim. 317. It has, however, been frequently referred to as sound: *Mann* v. *Thompson*, Kay, at p. 643; *Dias* v. *De Livera*, 5 A. C., at p. 134.

(*w*) First ed., Vol. II, p. 81.

(*x*) *Maddison* v. *Andrew*, 1 Ves. sen. 57.

children in the plural, with a provision for survivorship, was consistent with that construction; as was the word 'all,' which was satisfied by referring it to the children of any class who took shares (*y*).

Gift over in case parent die *without issue.*

"Lord Loughborough seems to have thought that where a devise or bequest of the nature of those under consideration is followed by a gift over, in case the parent die without issue, all children, without reference to the period of vesting in possession, are entitled. Thus, where (*z*) a testator devised, on a certain event, the produce of the sale of certain freehold estates to be divided between the children of his daughters E. and R., such of the children as should be sons *to be paid at their respective ages of twenty-one*, and such as should be daughters at their respective ages of twenty-one, or days of marriage respectively; and the testator bequeathed the residue of his personal estate to be equally divided between *the child and children* of his said two daughters, *in like manner as the money to arise from his real estate*; and, in case any child of his said daughters should marry and die in the lifetime of their respective mothers, then he directed that the issue of such child should stand in the place of their parent; *and, in case his said daughters should die without issue*, or such issue should die without issue in the lifetime of his said daughters, then over. It appeared, in the consideration of another question, that Lord Loughborough had previously decided, that the latter disposition extended to all the children of testator's daughter without reference to the age of twenty-one, by force of the clause limiting it over in case of the failure of issue of the daughters.

Mills v. *Norris.*

Remark on *Mills* v. *Norris.*

"It is not easy to perceive any solid ground for allowing to these words such an effect upon the construction. They either mean a failure of issue generally, in which case the gift over is void or, which seems to be the better construction, they refer to children (*a*), and, according to the opinion of Sir W. Grant, in *Godfrey* v. *Davis* (*b*), and the established rules of construction, the words importing a failure of issue are referable to the objects included in the previous gift.

"It is to be observed, that *Maddison* v. *Andrew*, and *Mills* v. *Norris*, were decided at a period when the rule against which they seem to militate was not so well settled, or, at all events,

(*y*) Mr. Jarman here goes on to state *Hughes* v. *Hughes* (3 Br. C. C. pp. 352, 434), but as the decision in that case is now generally supposed to be referable to another doctrine, it is stated *post*, p. 1659, n. (*l*).

(*z*) *Mills* v. *Norris*, 5 Ves. 335.

(*a*) See *Vandergucht* v. *Blake*, 2 Ves. jun. 534, and other cases treated of *post*, pp. 2051 *seq.*

(*b*) 6 Ves. 43 The M.R. appears to have been Sir R. Arden, and not Sir W. Grant.

they show that it was not so uniformly adhered to, as it now is. The uncertainty in which these cases tended to involve the doctrine has been completely removed by subsequent decisions" (*c*).

Mr. Jarman's conclusions criticised.

It may, perhaps, be doubted whether the law is so clearly settled as Mr. Jarman seems to have supposed, and whether the principle laid down in *Shepherd* v. *Ingram* (*d*) is not really the correct one. Mr. Roper says that *Mills* v. *Norris* was decided on the authority of *Shepherd* v. *Ingram*, and thus defends the decision (*e*): "It is obvious that the testator meant to provide for all the children of his daughters, and that the whole residue should go over to his brothers, if his daughters died without leaving a child, or the descendant of a child. This great object would have been disappointed if the fund became vested and distributable upon the eldest child attaining twenty-one, to the exclusion of after-born children; for in such case, if all the first class had died before their mothers (*f*), and they had left the second class of children surviving them, then, although the second description of children could take nothing, they would prevent the fund going to the testator's brothers, and he would have died intestate."

Rule not to be applied except when necessity requires.

Lord Loughborough said of the rule that though it is an extremely convenient construction, it is convenient only to the parties who profit by it; not to the children who are excluded (*g*). And Knight-Bruce, V.-C., remarked (*h*): "The rule recognised in the case of *Whitbread* v. *Lord St. John* (*i*) as to after-born children is artificial, and I think only to be adopted when necessity requires. Lord Eldon, in cases coming very near it, but distinguishable from it, held after-born children to be entitled."

Gift to grandchildren when all have attained twenty-one.

Accordingly, the rule is not applicable in cases where distribution is postponed until all the children attain the prescribed age, or (what is the same thing) until the youngest child attains that age. Thus, in *Mainwaring* v. *Beevor* (*k*), where a testator bequeathed the residue of his investments to trustees in trust thereout to maintain his grandchildren, the children of his sons A and B, until they should severally attain twenty-one, and accumulate the surplus dividends, and when

(*c*) See cases referred to *ante*, p. 1650.
(*d*) *Post*, pp. 1666, 1667.
(*e*) Legacies, 52.
(*f*) Mr. Roper assumes that none of them attained twenty-one.
(*g*) *Hoste* v. *Pratt*, 3 Ves., at p. 732.
(*h*) *Brandon* v. *Aston*, 2 Y. & C. C. C., at p. 30. "The rule is never applied unless it is necessary": *per* Buckley, J., in *Re Stephens*, [1904] 1 Ch., at p. 328. See *Re Chartres*, [1927] 1 Ch. 466, *ante*, p. 1639.
(*i*) 10 Ves. 152, *ante*, p. 1650.
(*k*) 8 Ha. 44. See *Darker* v. *Darker*, 1 Cr. & Mee. 850.

and so soon as all and every his said grandchildren should have attained twenty-one, in trust to pay and divide the fund among them, Wigram, V.-C., refused to decree a division of the fund as soon as all the grandchildren living had attained twenty-one. He pointed out the reason of the general rule: "Where a testator has given two inconsistent directions, and has said that the children, or (which is the same thing) all the children, shall participate in the fund, and then directs that there shall be a division when or as soon as each attains twenty-one, in that case you must do one of two things—you must either sacrifice the direction that gives a right to distribution at twenty-one, or sacrifice the intention that all the children shall take. The Court has in such cases decided in favour of the eldest child taking at twenty-one, as the will directs, and sacrificed the intention that all the children shall take." But the reason of the rule, as the V.-C. pointed out, does not apply where the right of the eldest child to distribution is postponed until the youngest child attains twenty-one: in such a case there is no way of avoiding the inconvenience of making the eldest child wait an indefinite time (*l*).

(*l*) *Mainwaring* v. *Beevor* was followed in *Armitage* v. *Williams*, 7 W. R. 650, and *Pilkington* v. *Pilkington*, 29 L. R. Ir. 370. In *Smith* v. *Jackson*, 1 L. J. (o.s.) Ch. 231, where there was a gift to A for life and after her death to all and every the child and children of his grandchildren in equal shares, to be paid to such child or children when the youngest or survivor of them should attain twenty-one; it was held by Leach, V.-C., that great grandchildren, born after the death of A, were excluded from the gift, even although born before the youngest great grandchild living at A's death attained twenty-one. The decision is inconsistent with the other authorities.

In his judgment in *Mainwaring* v. *Beevor*, the V.-C. referred to the case of *Hughes* v. *Hughes* (3 Br. C. C., pp. 352, 434; 14 Ves. 256), where a testator gave real and personal estate in trust to pay the income for the maintenance of all the children of his three daughters A, B, and C, share and share alike, until the youngest of his said grandchildren should attain twenty-one; and in case of the death of any of them before the youngest of those living should attain twenty-one, leaving children, then to such children, and when the youngest grandchild living should have attained twenty-one, then he gave one full proportionable share to such of his said grandchildren as should be then living, and the children of such as should be then dead. A question arose on the claim of the subsequently-born grandchildren to be admitted to a participation with those living at the testator's death. Lord Thurlow, during the argument, said, when the gift is general, it is always confined to the death of the testator: where there is a gift for life, or the distribution is postponed to a future time, then children born during the life or before that time are let in. On a subsequent day he decided in favour of the after-born grandchildren, the gift being to *all the grandchildren.* He distinguished the cases where the time for vesting the property in possession was perfectly marked out by the testator, and the distribution consequently was confined to those who had come *in esse* at that time: whereas here was a general gift not narrowed or controlled by any words the testator had used. By the decree it was declared that the residue should be divisible among the grandchildren of the testator who were living at his death, and that had been born since and that should be born, until the youngest of such grandchildren should attain the age of twenty-one. This apparently confined the class to those who had come *in esse* when the youngest for the time being attained twenty-one; and the word "living," as used in the trusts of the income, seems to require that construction; but the facts, so far as they can be collected, did not require a decision

CHAPTER XLII.

Contrary intention.

On the other hand, if the testator clearly expresses an intention to include only those children who are born before the youngest *in esse* attains twenty-one, effect will of course be given to it (*m*).

Provision for maintenance and advancement may exclude rule.

It seems that a trust for maintenance may have the effect of admitting after-born children. Thus, in *Bateman* v. *Foster* (*n*), a testator gave property upon trust for all and every the children or child of A, born and to be born, who should attain twenty-one, as tenants in common, and directed that the income of the share, or expectant share, of each such child should be paid to A during his life for the maintenance and advancement of each such child: it was held that a child of A who was living at the testator's death, and had attained twenty-one, was not entitled to a transfer of his share.

Discretionary trust for maintenance or power of advancement.

Whether a discretionary trust or power of maintenance or advancement can of itself have the effect of admitting after-born children, does not seem to be satisfactorily settled. A very special clause of maintenance and advancement was held by Romilly, M.R., to have that effect in *Iredell* v. *Iredell* (*o*), but the decision cannot be said to lay down any general principle. In *Bateman* v. *Gray* (*p*), where there was a gift to all the children of A "now or hereafter to be born, who shall attain twenty-one," with a discretionary power of advancement out of "the vested or presumptive share or respective shares of any child or children," the same Judge held that children born after the

between that and letting in every child whenever born. The testator died June 3, 1782, R. L., [1791] A. fol. 215. Wigram, V.-C., thought (8 Hare, 50) the decree might mean every grandchild whenever born. But that is inconsistent with the clause "that should be born until the youngest of such grandchildren should attain twenty-one," for none could be born after the birth of the absolute youngest. Mr. Jarman thought "such" in the decree referred to the grandchildren living at the testator's death, and that thus "the seeming inaccuracy of the case" was corrected. But that is not the grammatical sense. The case subsequently came on a petition for rehearing before Lord Eldon (14 Ves., p. 258), who varied the decree by declaring that the residue was divisible "among such of the testator's grandchildren (except T. C. H.), whether living at the testator's death or born afterwards, as were living at the time the youngest of such grandchildren shall appear to have attained the age of twenty-one years," R. L., [1807] A. fol. 1091. It appears to have been assumed that John Erasmus Adlam, a grandchild born after the testator's death, who attained twenty-one in 1806, and was the youngest for the time being, was the youngest "living" within the meaning of the will.

In criticising Lord Thurlow's spoken judgment Mr. Jarman points out that the expression "all the children" has been held to be inadequate to enlarge the construction, referring to *Whitbread* v. *Lord St. John*, 10 Ves. 152; *Heathe* v. *Heathe*, 2 Atk. 121; *Singleton* v. *Gilbert*, 1 Cox, 68; *Scott* v. *Harwood*, 5 Mad. 332, all cited *ante*, pp. 1650, 1639.

(*m*) *Gooch* v. *Gooch*, 3 D. M. & G. 366. Compare *Hughes* v. *Hughes*, 14 Ves. 256, *ante*, note (*l*). A testator in a gift to his own children may postpone distribution until the youngest attains a specified age (*Hole* v. *Marsland*, 4 L. T. 781), or until some other event: *Berry* v. *Briant*, 2 Dr. & S. 1.

(*n*) 1 Coll. 118.

(*o*) 25 Bea., at p. 485.

(*p*) L. R. 6 Eq. 215.

eldest attained twenty-one were included in the class. It is clear that a power of maintenance out of presumptive shares has no such effect (*q*). *Iredell* v. *Iredell* was followed in *Re Courtenay* (*r*).

Rule excluded by trust for accumulation.

The operation of the rule may be excluded by a trust for accumulation. Therefore, if there is a trust to accumulate income for twenty-one years from the testator's death, and a gift of the accumulated fund to the children of A who attain twenty-one, the children born during the period of accumulation are entitled to share, whether born before or after the eldest child attains twenty-one (*s*).

Rule does not apply to gifts of income.

On the same principle (namely, that the rule ought not to be applied except in cases of necessity), the rule does not apply where the income of a fund is given to the children of A on their respectively attaining the age of twenty-one, during their respective lives (*t*). In such a case, the share of each child who has attained twenty-one is diminished from time to time whenever a younger child attains that age (*u*).

Intermediate income.

In cases where property is given to a class of persons contingently on their attaining a certain age or marrying, questions sometimes arise as to the destination of the income while the ultimate constitution of the class is uncertain. So far as gifts of residue or of an income-bearing fund are concerned, the rule is clearly settled that each contingent member is entitled to the income of his contingent share; and this is so whether the class is capable of increase or not (*v*). In the former case, the children for the time being in existence are entitled to the income, so that whenever a child is born the share of each in the subsequent income is diminished (*w*). If the class is incapable of increase, the share of each child cannot be diminished, but may be increased by the death of any child before attaining a vested interest.

Maintenance.

The question has frequently been raised in connection with section 43 of the Conveyancing Act, 1881 (*x*), providing for the maintenance of infants. It is now settled that if residuary

(*q*) *Gimblett* v. *Purton*, L. R. 12 Eq. 427 (where Malins, V.-C., expressed disapproval of *Bateman* v. *Gray*); *Re Deloitte*, [1919] 1 Ch. 209 (where "vested" was held to refer to one legacy and "presumptive" to another).

(*r*) 74 L. J. Ch. 654.

(*s*) *Watson* v. *Young*, 28 Ch. D. 436; *Re Stephens*, [1904] 1 Ch. 322.

(*t*) *Re Wenmoth's Estate*, 37 Ch. D. 266. See *Re Powell*, [1898] 1 Ch. 227, referred to *ante*, p. 1640.

(*u*) *Re Stephens*, [1904] 1 Ch. 322.

(*v*) *Hawkins* v. *Combe*, 1 Br. C. C. 335; *Brandon* v. *Aston*, 2 Y. & C. C. C. at p. 30; *Stone* v. *Harrison*, 2 Coll. 715.

(*w*) *Mainwaring* v. *Beevor*, 8 Ha. 44; *Rochford* v. *Hackman*, 9 Ha. 475; *Re Jeffery*, [1895] 2 Ch. 577.

(*x*) Now replaced and extended by section 31 of the Trustee Act, 1925.

personal estate is given upon trust for the children of A who attain twenty-one, the income is available for the maintenance of all of them while they are all under age (*y*), and after one or more have attained twenty-one, and thus acquired vested interests in their shares, the income of the remaining shares is available for the maintenance of the infant children (*z*).

The same result follows where real estate is given upon the same trusts as the residuary personal estate (*a*).

Pecuniary legacy.

A pecuniary legacy to each member of a class (such as the children of A) contingently on his attaining twenty-one, does not, as a general rule (*b*), carry interest, and consequently the income arising from, or attributable to, the legacy is not available for maintenance (*c*). But if a legacy is directed to be held in trust for children who attain twenty-one, the general rule is that the legacy is segregated from the residue and that children under age are entitled to their share of the income (*d*), which is therefore available for maintenance (*e*).

Specific bequest before 1926.

Before 1926 the same rules applied where the gift is a specific bequest of leaseholds or other personalty (*f*).

Real estate before 1926.

It has been already pointed out (*g*) that a contingent devise of land, whether specific or residuary, did not before 1926 carry the intermediate rents and profits. And under a devise to the children of A contingently on their attaining twenty-one, the first child who attained twenty-one was entitled to all the rents until the next child attained twenty-one, when the latter became entitled to a half of the rents, and so on (*h*). The rule was the same if the devise was to a trustee, so that the limitations were equitable (*i*).

Rule where no object exists at period of distribution.

(F) *Where no Object exists when Gift falls into Possession.*—(1) *Immediate Gift.*—Mr. Jarman continues (*k*): "We are

(*y*) *Re Adams*, [1893] 1 Ch. 329.

(*z*) *Re Holford*, [1894] 3 Ch. 30, overruling *Re Jeffery*, [1891] 1 Ch. 671.

(*a*) *Re Burton's Will*, [1892] 2 Ch. 38.

(*b*) As to the exception where the testator stands *in loco parentis* to the legatee, see *ante*, p. 1079. And a testator may of course expressly give the intermediate income to the legatee, as in *Re Bowlby*, [1904] 2 Ch. 685. And a general intention to provide maintenance may cause interest to be payable from the testator's death: *Re Churchill*, [1909] 2 Ch. 431, following *Pett* v. *Fellows*, 1 Swans. 561 n., as explained by Sugden, L.C., in *Leslie* v. *Leslie*, Ll. and G. t. Sugden, pp. 1, 3.

(*c*) *Re Dickson*, 29 Ch. D. 331; *Re Inman*, [1893] 3 Ch. 518, where the earlier authorities are cited.

(*d*) *Kidman* v. *Kidman*, 40 L. J. Ch. 359; *Re Medlock*, 55 L. J. Ch. 738.

(*e*) *Re Clements*, [1894] 1 Ch. 665.

(*f*) *Re Woodin*, [1895] 2 Ch. 309, disapproving *Furneaux* v. *Rucker*, [1879] W. N. 135; *Re Eyre*, [1917] 1 Ch. 351.

(*g*) *Ante*, p. 929. This has now been altered by section 175 of the Law of Property Act, 1925.

(*h*) *Re Averill*, [1898] 1 Ch. 523.

(*i*) *Ib.*

(*k*) First ed., Vol. II, p. 84.

now to consider the effect upon *immediate* and *future* gifts to children of a failure of objects at the period when such gift would have vested in possession. With regard to immediate gifts (*l*), it is well settled that if there is no object *in esse* at the death of the testator, the gift will embrace *all* the children who may subsequently come into existence, by way of executory gift.

Where the gift is immediate, all afterwards born entitled.

"Thus, in *Weld* v. *Bradbury* (*m*), a testator bequeathed certain monies to be put out at interest; one moiety to be paid to the younger children of M. living at his (the testator's) death, and the other moiety *to the children of S. and N.* Neither S. nor N. had any child living at the date of the will (*n*), or at the death of the testator. It was held to be an executory devise, [qu. bequest?] to such children as they or either of them should *at any time* have.

Shepherd v. *Ingram.*

"So, in *Shepherd* v. *Ingram* (*o*), a gift of the residue of the testator's real and personal estate to such child or children as A should have, taking upon them the name of S, was held to embrace all after-born children, there being no child at the testator's death.

"Devises and bequests of this nature have given rise to two questions: 1st, As to the destination of the income between the period of the testator's death and the birth of the child; 2ndly, As to the appropriation of the income between the birth of the first and the birth of the last child.

Destination of income until birth of child.

"With respect to the first, if the subject of gift be a sum of money, it is sufficient to say that the legacy is not payable until the birth of a child. It is also clear, that where a *residue* of personalty is given in this manner, the bequest will carry the intermediate produce as part of such residue (*p*). On the other hand, if it were a devise of real estate, the rents accruing between the death of the testator and the birth of a child would devolve upon the heir as real estate undisposed of, unless there was a general residuary devise (*q*); nor would the circumstance of there being an immediate devise of the real estate to trustees (*r*)

(*l*) "Where a person taking a preceding life interest dies in the testator's lifetime, the gift is of course treated as immediate: *Haughton* v. *Harrison*, 2 Atk. 329." (Note by Mr. Jarman.)

(*m*) 2 Vern. 705. See also *Haughton* v. *Harrison*, 2 Atk. 329; *Darker* v. *Darker*, 1 Ch. & M. 850, *post*, p. 1664.

(*n*) "This," as Mr. Jarman remarks, "was immaterial."

(*o*) Amb. 448. Also reported under the name of *Gibson* v. *Rogers*, Amb. 93, and *Gibson* v. *Lord Montfort*, 1 Ves. sen. 485, below.

(*p*) *Harris* v. *Lloyd*, T. & R. 310; see *Bullock* v. *Stones*, 2 Ves. sen. 521.

(*q*) *Harris* v. *Lloyd*, T. & R. 310, and *Hopkins* v. *Hopkins*, Cas. t. Talb. 44.

(*r*) *Bullock* v. *Stones*, 2 Ves. sen. 521.

CHAPTER XLII.

Is immediate income to be accumulated?

vary the principle, the only difference being that the heir would take the equitable, instead of the legal interest. The great difficulty, however, in these cases, is to determine whether the will indicates an intention to accumulate the immediate rents for the benefit of unborn objects. A question of this kind was much considered in the case of *Gibson* v. *Lord Montfort* (*s*), where A gave his freehold and personal estate to trustees, in trust to pay certain annuities and legacies out of the produce of his personal, and, in case of deficiency, out of his real estate, and he gave the residue of his real and personal estate *to such child or children as his daughter B should have*, whether male or female, equally to be divided between or among them. If B should die without issue of her body then over. By another clause, A directed, that, upon the deaths of the persons to whom the annuities for lives were given, such annuities as should fall in from time to time should go back to the residue, *and go to those in remainder over*. By a codicil he added, provided his daughter died without issue, but *if she should leave a child or children, such annuities as fell in should be divided among them, share and share alike*. B having no child at the death of the testator, it became necessary to determine the destination of the immediate income. It was admitted, that, as to the personal estate, it passed by the residuary clause, but the accruing profits of the real estate subject to the charges were claimed by the heir as undisposed of. Lord Hardwicke, after a long argument on the terms of the will, and, after admitting that the heir was entitled to what was not given away by express words or necessary implication, held that the intermediate profits passed to the trustees for the benefit of the devisees; his Lordship thinking, upon the whole, there was an intention to accumulate; for which he relied partly on the fact of the real and personal estate being comprised in one clause (*t*), and on the expression in the will and codicil respecting the annuities."

Darker v. *Darker*.

In *Darker* v. *Darker* (*u*), land was devised in trust for the testator's nephews and nieces by name, "when the younger shall come of age," and if the testator's brother T. D. should have children, they were to have equal shares with the named nephews and nieces: it was held that on the youngest of the latter coming of age, they were entitled to the rents and profits, but in the event of T. D. having any children, they would share equally from their birth.

(*s*) 1 Ves. sen. 485.

(*t*) On this point, *vide Genery* v. *Fitzgerald*, Jac. 468, and other cases, cited *ante*, p. 930.

(*u*) 1 Cr. & M. 850.

Mr. Jarman continues (*x*): "The other question arising on these gifts to children is, as to the destination of the income accruing in the interval between the births of the eldest and the youngest child, with respect to which it is settled, (nor could it have been doubted upon principle), that the children for the time being take the whole.

Children for the time being take the whole income.

"This question came before Lord Northington, in *Shepherd* v. *Ingram* (*y*), on the construction of the will already stated, at the instance of three of the children of the testator's daughter, who had, subsequently to the judicial consideration of the will on the former occasion, come into existence, and now prayed (their parent being yet alive) to have an account of the profits, and that so much as became due from the birth of the first child until the second was born, might be declared to belong to the first, and after the birth of the second, until a third was born, to belong to the first and second child, and so on to the others; and his Lordship was very clearly of opinion, that the children (*z*) took a defeasible interest in the residue, suggesting the case of a legal devise of a residue to the daughters, with a subsequent clause declaring, that if all the daughters should die in the lifetime of their mother, then the residue should go over; that would be an absolute devise with a defeasible clause, and the daughters in that case would be clearly entitled to the interest and profits till that contingency happened" (*a*).

Where gift is to children on attaining twenty-one.

Where the gift is to the children of A on attaining twenty-one, and no child of A is in existence at the testator's death, it is doubtful whether all the children of A who attain twenty-one will be entitled, or only those who are in existence when the eldest attains that age. In *Haughton* v. *Harrison* (*b*), where the gift was to the children of the testator's daughter, arriving at the age of twenty-one, the question did not arise, but Lord Hardwicke said: "It is plain the grandchildren born after the testator's death are entitled, for as they were not *in esse* in his lifetime, the testator must have had in his view future children of his daughter." In *Armitage* v. *Williams* (*c*), the income of

But if distribution postponed till twenty-one, none let in after eldest attains twenty-one.

(*x*) First ed., Vol. II, p. 87.

(*y*) Amb. 448, *ante*, p. 1663.

(*z*) Mr. Jarman observes in a note: "The word in the report is 'daughters'; but this was evidently used in mistake for children," but the children must have been all daughters, otherwise Lord Northington's illustration would be unintelligible.

(*a*) Compare *Mills* v. *Norris*, 5 Ves. 335; *Scott* v. *Earl of Scarborough*, 1 Bea. 154; *Mainwaring* v. *Beevor*, 8 Hare, 44; *Ellis* v. *Maxwell*, 12 Bea. 104, and other cases cited, *ante*, p. 1661. Mr. Jarman misunderstood the decision in *Mills* v. *Norris* (see Roper on Legacies, 1315, and the 3rd edition of this work, by Messrs. Wolstenholme and Vincent, Vol. II, p. 157).

(*b*) 2 Atk. 329.

(*c*) 7 W. R. 650. The M.R.'s statement of the "rule of the Court for ascertaining the period of distribution" must not be taken as the general rule.

certain securities was directed "to be applied to the education of the children of A and B in equal shares, and on their attaining the age of twenty-one years the whole to be sold and divided equally among them. Should the said A and B die without issue," the fund was given on the same conditions to the children of C and D. At the death of the testator neither A nor B had any children; after his death they both had several children. It was held by Romilly, M.R., that all the children whenever born were entitled: but this was apparently because the will was considered to direct a division when *all* the children had attained the age, and thus to bring the case within *Mainwaring* v. *Beevor* (*d*).

Bequest of a certain sum to each member of a class.

It has been already mentioned that a gift of a certain sum to each of a class of objects at a future period (as to each of the children of A who attain twenty-one) is confined to those living at the testator's death, and that consequently if no object is living at the testator's death the gift fails altogether (*e*).

Disposition of intermediate income in such cases.

With reference to the two questions above stated, namely (1) as to the destination of the income between the period of the testator's death and the birth of a child, and (2) as to the appropriation of the income between the birth of the first and the birth of the last child, the rule was thus stated in the third and subsequent editions of this work: "If the bequest be contingent, a child only presumptively or contingently entitled is, for the purpose of answering either of the above questions, to be considered as not in existence; so that in the first case the intermediate profits will go to the next-of-kin or heir-at-law, or to the residuary legatee or devisee (*f*), and in the second, to the children who have attained a vested interest, notwithstanding the existence of children who may be eventually entitled to a share" (*g*). But the answer to the second question depends on the nature of the property and the provisions of the will. The question has been already discussed (*h*).

(*d*) *Ante*, p. 1658.

(*e*) *Rogers* v. *Mutch*, 10 Ch. D. 25; *ante*, p. 1656.

(*f*) *Haughton* v. *Harrison*, 2 Atk. 329; *Shawe* v. *Cunliffe*, 4 B. C. C. 144.

(*g*) "This seems a necessary conclusion, though no express authority has been found. See *Stone* v. *Harrison*, 2 Coll. 715, but see *Brandon* v. *Aston*, 2 Y. & C. C. C. 30."

The passage in the text, and notes (*f*) and (*g*) are reprinted verbatim from the 3rd edition of this work, by Messrs. Wolstenholme and Vincent (Vol. II, p. 157). In the 4th edition the editor (Mr. Vincent) added that the "necessary conclusion" referred to in note (*g*) appeared to be supported by *Furneaux* v. *Rucker*, [1879] W. N. 135. *Furneaux* v. *Rucker*, however, is not regarded as a satisfactory authority (see *Re Woodin*, [1895] 2 Ch. 309). The property was leasehold (*Re Burton's Will*, [1892] 2 Ch. 38).

(*h*) *Ante*, p. 1664.

Effect where there is no object at or before time of distribution.

(2) *Gift in Remainder.*—Mr. Jarman continues (*i*) : " The next inquiry is, as to the rule of construction which obtains, where the gift to the children is preceded by an anterior interest, and no object comes into existence before its determination; as in the case of a gift to A for life, and after his decease, to the children of B; and B has no child until after the death of A. It is clear that in such a case, if the limitation to the children of B were a legal remainder of freehold lands, it would (*k*) fail by the determination of the preceding particular estate before the objects of the remainder came *in esse* (*l*). This rule, however, originating in feudal principles, is not applicable to equitable limitations of freehold estate, and accordingly it has been held, that in a similar devise, by way of trust, the ulterior limitation does not fail by the non-existence of objects during the life of A, the tenant for life, but takes effect in favour of such objects whenever they come into existence. Thus, in *Chapman* v. *Blissett* (*m*), where lands were devised to trustees upon certain trusts during the life of A, and at his decease as to one moiety in trust for the children of A, and as to the other moiety in trust for the children of B. B had no child born until after the decease of A; and it was held that such after-born child was entitled to the latter moiety; Lord Talbot observing, that, ' in regard to trusts, the rules are not so strict as at law; for the whole legal estate being in the trustees, the inconvenience of the freehold being in abeyance, if the particular estate determines before the contingency (upon which the remainder depends) does happen, is thereby prevented.' "

Legal contingent remainder.

Equitable contingent remainder.

Personal estate.

The rule also is not applicable to bequests of personal estate. The law on the subject does not seem to have been clearly settled in Mr. Jarman's time, but he considered that on principle, notwithstanding some apparently adverse authority, the rule applicable to bequests of personal estate is that " a bequest to A for life, and after his death to the children of B, is not defeated by the non-existence of an object at the death of A, but will take effect in favour of all the subsequently born children as they arise " (*n*). The correctness of the rule thus stated is clearly established (*o*).

(*i*) First ed., Vol. II, p. 88.

(*k*) Unless saved by the Contingent Remainders Act, 1877, *ante*, p. 1418.

(*l*) *Ante*, p. 1417. (*m*) Cas. t. Talb. 145.

(*n*) First ed., Vol. II, p. 92. Mr. Jarman's difficulty arose chiefly from the judgment of Sir W. Grant, M.R. (Lord Alvanley), in *Godfrey* v. *Davis*, *post*. " That case was, in my opinion, in the opinion of Sir Thomas Plumer, and I should have said in the opinion of almost every lawyer, well decided; but unfortunately in the report (6 Ves. 43) of what was said by Lord Alvanley on that occasion, his language is certainly too unqualified " : *per* Stuart, V.-C., in *Conduitt* v. *Soane*, 4 Jur. (N.S.), at p. 504. Mr. Jarman's comments on *Godfrey* v. *Davis* will be found in earlier editions of this work.

(*o*) *Wyndham* v. *Wyndham*, 3 Br. C. C. 58; *Hutcheson* v. *Jones*, 2 Mad.

Where fund distributable on death of tenant for life.

The rule last stated does not apply if the class is to be ascertained when the fund falls into possession; for if a period is distinctly fixed when the distribution is to take place, the children born after that period are not entitled. *Godfrey* v. *Davis* (*p*) was decided on this principle (*q*).

Existence up to time of distribution not necessary.

"And here," says Mr. Jarman (*r*), "the student should be reminded, that where, in the preceding observations, mention is made of the *objects at the period of distribution*, this is not intended to designate children *existing* at that period; for it has been already shown, that all who have existed in the interval between the death of the testator and the period of distribution, whether living or dead at the latter period, are objects of the gift, and may therefore not improperly be termed objects *at that period*; their decease before the period of distribution having no other effect than to substitute their respective representatives, supposing, of course, the interest to be transmissible.

Whether gift over in default of children enlarges class of objects entitled.

"It is to be observed, that the rules fixing the class of objects entitled under gifts to children are not in general varied by a limitation over, in case the parent should die without children, or in case *all* the children die, etc., as these words are construed merely to refer to the objects of the preceding gift. It is true, indeed, that in *Hutcheson* v. *Jones* (*s*) some stress was laid by Sir T. Plumer, V.-C., on the words giving the property over in default of child or children, as importing that the ulterior gift was not to take effect unless in the event of the failure of *all* the children; but in *Andrews* v. *Partington* (*t*) a pecuniary legacy to *all* the children of A, payable at twenty-one or marriage, with a bequest over in case *all* the children died before their shares became payable, was confined to children who were *in esse* when the first share became payable. So, in the more recent case of *Scott* v. *Harwood* (*u*), where the devise was to the use and behoof of all and every the child and children of A lawfully begotten, and their heirs for ever; and in case the said children of A should all die before they attained the age of twenty-one years, then over; Sir J. Leach, V.-C., held, that the children of A living at the testator's death were exclusively

Remark on *Scott* v. *Harwood*.

124; *Conduitt* v. *Soane*, 4 Jur. (N.S.) 502. Mr. Jarman also refers to *Horseman* v. *Abbey*, 1 J. & W. 381 (which, however, he admits "was not distinctly decided upon this point"), and to *Beaulieu* v. *Cardigan*, Amb. 533.

(*p*) 6 Ves. 43. Mr. Jarman's lengthy comments on this case are omitted in this edition, there being no question that the decision itself was correct, *ante*, note (*n*).

(*q*) *Per* Plumer, M.R., in *Hutcheson* v. *Jones*, 2 Madd., at p. 129; *Conduitt* v. *Soane*, *supra*.

(*r*) First ed., Vol. II, p. 97.

(*s*) 2 Madd. 124.

(*t*) 3 B. C. C. 401.

(*u*) 5 Mad. 332.

entitled, and that *in the devise over 'the testator must, by necessary inference, be considered as speaking of the children to whom the estate is given.'* If it be objected, that in this case the expression 'the said children' required such a construction, the answer is, that the preceding gift being to *all* the children, the referential expression had the same force as if the same terms were repeated, and consequently the effect of the whole would be, according to Sir T. Plumer's doctrine in *Hutcheson* v. *Jones*, that the estate was not to go over until the failure of *all* the children."

Gift to children *to be born* or *to be begotten.*

(G) *Effect of Words "born," or "begotten," or "to be born," etc.*—Mr. Jarman continues (*x*): "We are now to consider how the construction is affected by the words '*to be born*' or '*to be begotten*,' annexed to a devise or bequest to children; with respect to which the established rule is, that if the gift be immediate, so that it would, but for the words in question, have been confined to children (if any) existing at the testator's death, they will have the effect of extending it to *all* the children who shall ever come into existence; since, in order to give to the words in question *some* operation, the gift is necessarily made to comprehend the whole.

Where they extend the class.

Mogg v. *Mogg.*

"Thus, in the well-known and important case of *Mogg* v. *Mogg* (*y*), where a testator devised a certain property called the Mark Estate to trustees, in trust to pay the rents towards the support and maintenance of the child and children begotten *and to be begotten* (*z*) of his daughter, Sarah Mogg: it was contended that, notwithstanding the words 'to be begotten,' the devise could apply to only the children born before the testator's death, as those words might be satisfied by letting in the children born after the date of the will before the death of the testator; but the Court of King's Bench (on a case from Chancery) certified that all the nine children of Sarah Mogg, including five who were born after the death of the testator, took under the devise; and Sir W. Grant, M.R., expressed his concurrence in the certificate.

(*x*) First ed., Vol. II, p. 98. (*y*) 1 Mer., pp. 654, 658.

(*z*) "In the marginal note of the report these words are omitted. The case is deserving of attentive perusal, as it illustrates almost every rule regulating the class of children entitled under immediate and future devises." (Note by Mr. Jarman.)

The decision in *Mogg* v. *Mogg* was followed by Romilly, M.R., in *Eddowes* v. *Eddowes*, 30 Bea. 603.

In *Gooch* v. *Gooch*, 14 Bea. 565, Romilly, M.R., considered that a gift to "all the children which A hath or shall have" would *prima facie* come within the doctrine laid down in *Mogg* v. *Mogg*, but on the whole will it was held, both by the M.R. and by Lord Cranworth (3 D. M. & G. 366), that the class was closed as soon as the youngest child for the time being attained twenty-one; see *ante*, p. 1558.

As to the meaning in a gift of this nature, of the words "born in due time after" the testator's death, see *Re Wass*, [1882] W. N. 158.

CHAPTER XLII.

Distinction in regard to general pecuniary legacies.

"This rule of construction, however, does not apply to general pecuniary legacies, where the effect of letting in children born after the death of the testator would be to postpone the distribution of the general estate (out of which the legacies are payable), until the death of the parent of the legatees.

"Thus, in the case of *Sprackling* v. *Ranier* (*a*), where a testator in a certain event gave a legacy to the sons and daughters of his daughter lawfully begotten *or to be begotten*: a child born after the death of the testator was held to be excluded.

"So, in the later case of *Storrs* v. *Benbow* (*b*), where a testator bequeathed £500 'to each child *that may be born* to either of the children of either of my brothers, lawfully begotten, to be paid to each of them on his or her attaining the age of twenty-one years, without benefit of survivorship'; Sir J. Leach, M.R., held, that the gift was confined to children living at the testator's death, his Honor considering that the words 'may be born,' provided for the birth of children between the making of the will and the death of the testator; and he observed, that to give a different meaning to the words would impute to the testator the inconvenient and improbable intention that his residuary personal estate should not be distributed until the deaths of his brothers' children" (*c*).

(*a*) 1 Dick. 344; but as to this case see *post*, note (*c*).

(*b*) 2 My. & K. 46, affirmed 3 D. M. & G. 390, and *Townsend* v. *Early*, 28 Bea. 429; 3 D. F. & J. 1 (same will). See also *Butler* v. *Lowe*, 10 Sim. 317. As to *Defflis* v. *Goldschmidt*, 19 Ves. 566; 1 Mer. 417, see *ante*, p. 1656.

(*c*) "The reason lastly assigned by the M.R. is the only one which characterises this class of excepted cases. The former argument would apply equally to cases within the general rule stated *ante*, p. 1669." (Note by Mr. Jarman.) The rest of this note is taken verbatim from the 4th edition of this work, by Mr. Vincent, Vol. II, p. 179. "It has indeed been suggested that these excepted cases furnish the general rule, from which *Mogg* v. *Mogg* and *Gooch* v. *Gooch*, as relating only to real estate, are themselves the exception, *Dias* v. *De Livera*, 5 A. C. 134, 135. No reason is given why there should be any such distinction between real and personal estate, unless a vague allusion to the feudal system was so intended. A distinction derived from this source would, however, tell the other way, since feudal law accelerates the vesting of estates and (by consequence) the ascertainment of classes.

"*Sprackling* v. *Ranier*, 1 Dick. 344, was also cited (5 A. C. 133) as a 'direct authority' that the words in question do not enlarge the class. But in that case the gift was to G. for life, and afterwards to his sons and daughters, and their children, if any then dead, equally, *per stirpes*; and if G. should die without issue, then to the sons and daughters of M., lawfully begotten or to be begotten, and their children, in case any of them should be *then* dead leaving issue, equally, *per stirpes*. G. died without issue in the testator's lifetime. At the death of G., M. had three children, and after the testator's death gave birth to a fourth. It was held by Sir T. Clarke, M.R., that only such of the children of M. as were living at the death of G. were entitled. 'The Court (he said) will sometimes extend the words "then living" to those living at the time of the will, but never further than the death of the testator.' It is plain, therefore, that the decision turned on the word 'then' tying down the class to the death of G., and that the case has no bearing upon the question under consideration.

"It is true that *Butler* v. *Lowe* was treated by Sir L. Shadwell as a case

Comment on the state of the authorities.

It may, perhaps, be doubted whether the general rule stated by Mr. Jarman, so far as bequests of personalty are concerned, is in accordance with the principle adopted by the Court in dealing with gifts to children, namely, that such gifts are restricted to children living at the testator's death, unless there is some strong reason to extend the class to after-born children. Thus, as we have seen, an immediate gift to "all the children" of A (the meaning of which on the part of the testator is obvious) is restricted to children born or *en ventre* at the testator's death. This being so, it is difficult to see, on principle, why mere words of futurity, such as "to be born" or "to be begotten," should extend the class, inasmuch as they can be referred to the period between the date of the will and the testator's death (*d*). How the rule in *Mogg* v. *Mogg* came to be established is not clear, for the Judges gave no reasons for their decision. Mr. Preston in his argument urged that the equitable rule established by *Ellison* v. *Airey*, *Heath* v. *Heath*, and other cases, did not apply to devises of land, and that the effect of the words "to be begotten" in the case at bar was to give the born children an estate which "afterwards opens to let in any other child who may be born": he treated it as an executory devise (*e*). In this state of the authorities it seems that the rule, as stated by Mr. Jarman, has not been established so far as bequests of personalty are concerned.

Words of futurity do not vary the construction of a *future* gift.

Mr. Jarman continues (*f*): "It seems to be established, too, that the expression children *to be* born or children *to be* begotten, when occurring in a gift, under which *some* class of children born after the death of the testator would, independently of this expression of futurity, be entitled, so that the words may be satisfied without departing from the ordinary construction, that construction is unaffected by them.

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within 'the general rule'; but, having regard to the argument in that case, this must have meant 'the general rule respecting distinct legacies.'

"It may be added that *Dias* v. *De Livera* did not, and could not, raise the precise point. That case turned on the construction of a mutual will, executed by husband and wife according to the Roman-Dutch law of Ceylon, and operating at different times on the different moieties of the joint property; a very different instrument from an English will." [The reference to *Sprackling* v. *Ranier* as a "direct authority" is contained in the judgment of Leach, M.R., in *Storrs* v. *Benbow*. The passage is cited in the judgment of the P.C. in *Dias* v. *De Livera*. It should be noticed that *Sprackling* v. *Ranier* is not an authority for the points on which it was cited by Leach, M.R., and Mr. Jarman, for the bequest was not of a legacy to each of the children of M., but of a sum of £600 to the children of M. "begotten or to be begotten," equally *per stirpes*. (Note by Mr. C. Sweet.)]

(*d*) See *Scott* v. *Scarborough*, 1 Bea., at p. 168; *Storrs* v. *Benbow*, *Townsend* v. *Early*, and *Dias* v. *De Livera*, *supra*. Mr. Jarman himself admits this, *ante*, p. 1670, note (*c*).

(*e*) 1 Mer., pp. 682 *seq*.

(*f*) First ed., Vol. II, p. 100.

"Thus, in *Paul* v. *Compton* (*g*), where a testator bequeathed the residue of his personal estate in trust for his wife for life, and after her decease unto such of his daughters and such of their children as she should by will appoint, recommending her 'to provide for such child or children as may *hereafter be born* of my said two daughters'; and in default of such disposition, then in trust for the children of the daughters; Lord Eldon held that this power to the wife did not authorise her to appoint to children *not born in her lifetime*.

"So, in *Whitbread* v. *Lord St. John* (*h*), his Lordship decided that a bequest unto and among the child and children of A born *and to be born*, as many as there might be, *when and as they should attain their age of twenty-one years, or be married* with consent, was confined to his children living at the death of the testator and those who afterwards came *in esse* before the first share vested in possession, according to the rule before adverted to (*i*). But if the bequest is to 'such children as shall hereafter be born during the lives of their respective parents,' of course this construction is excluded by the express terms of the will, and all the after-born children will be let in, whether born before the period of distribution (*k*) or not.

Words of futurity do not necessarily confine devise to *future* children.

"It has been decided, too, that the words 'which shall be begotten,' or 'to be begotten,' annexed to the description of children or issue, do not *confine* the devise to future children; but that the description will, notwithstanding these words, include the children or issue in existence antecedently to the making of the will (*l*).

"This doctrine is as old as the time of Lord Coke, who says (*m*), that as *procreatis* shall extend to the issues begotten

(*g*) 8 Ves. 375.

(*h*) 10 Ves. 152, followed in *Gilbert* v. *Boorman*, 11 Ves. 238.

(*i*) See *ante*, p. 1650. In *Eddowes* v. *Eddowes*, 30 Bea. 603, the bequest was not so confined: *Whitbread* v. *Lord St. John*, however, was not cited.

(*k*) *Scott* v. *Earl of Scarborough*, 1 Bea. 154. In *Parsons* v. *Justice*, 34 Bea. 598, the gift was to A for life, and after her death to all the children of B, who should be living at the testator's death or be born afterwards who should attain twenty-one; and the testator directed that no child attaining twenty-one should be excluded from his share in consequence of any other child or children having previously attained a vested interest in his share or shares, but that each child attaining in B's lifetime a vested interest in his share should thenceforth *during B's life* be entitled to receive the whole income of his vested share for the time being, subject to the contingent right of any after-born child to such vested share; one of the children attained twenty-one during A's lifetime, and it was held by Romilly, M.R., that the class was closed at A's death, although B was still alive. The decision in effect struck several material provisions out of the will, and cannot be regarded as an authority to be followed.

(*l*) *Doe* d. *James* v. *Hallett*, 1 M. & Sel. 124. Cf. *Re Hewitt* [1926] 1 Ch. 740 ("shall take the veil"). See the same principle applied to a deed: *Hewet* v. *Ireland*, 1 P. W. 426; 2 Coll., at p. 344, n.

(*m*) Co. Lit. 20 b.

afterwards, so *procreandis* shall extend to the issues begotten *before* (*n*).

"Hereafter to be born," does *not* exclude existing children.

"And it seems that even the words '*hereafter* to be born' will not exclude previously-born issue (*o*), to prevent, Lord Talbot has said, the great confusion which would arise in descents by letting in the younger before the elder. But, as a rule of construction, it must be founded on presumed intention; it supposes that the testator, by mentioning future children, and them only, does not thereby indicate an intention to exclude other objects, and in this view is certainly an exception to the maxim, *expressio unius est exclusio alterius*" (*p*).

In a case (*q*) where by a codicil a testatrix revoked a legacy given by her will to her sister A, and gave a like sum in trust for her during her life, and after her death for "the child or, if more than one, for all and every the children of A, whether by her present or any future husband," it was held by Wood, V.-C., that a child, who was the only child of A by a former husband (who was dead at the date of the will) was entitled. "Neither internally nor externally," said the V.-C., "was there any evidence of an intention to exclude this child by a former husband. The testatrix, who had by her will given the legacy to her sister absolutely, revoked by codicil the absolute gift, and after giving her a life interest, introduced the provision for the children. She knew that her sister had one child living. There might be more, and it was immaterial to

(*n*) Accordingly in *Almack* v. *Horn*, 1 H. & M. 630, where a testator devised real estate to his daughter A, a widow, and his granddaughter B, and the survivor for life, remainder to all the children of A and B lawfully to be begotten as tenants in common in tail; B was the only child of A; but notwithstanding this, and the apparently future import of the expression "to be begotten," it was held by Wood, V.-C., that she was entitled with her own children to share in the remainder; the correct view in his opinion being that the expression had no reference at all to time, but merely pointed out the *stirps*. See analogous cases upon gifts to next-of-kin, *ante*, pp. 1617, 1618.

(*o*) *Hebblethwaite* v. *Cartwright*, Cas. t. Talb. 30; "which seems to overrule the position of Lord Hale, that the words 'in posterum procreandis' exclude sons born before, on account of the peculiar force of 'in posterum'; Hal. MSS. cit. Harg. and Butl. Co. Lit. 20, b, n. 3; 3 Leon. 87." (Note by Mr. Jarman). In the case put by Lord Coke, the words "hæredibus procreandis" are words of limitation, not of purchase.

(*p*) *Harrison* v. *Harrison*, Ir. R. 10 Eq. 290, was decided on the same principle.

"Compare the principle of these cases with that of *Shuldham* v. *Smith*, 6 Dow. 22, *ante*, p. 1359. The cases in the text strongly exemplify the anxiety of the Courts to avoid giving devises to children, an operation that will restrict them to certain classes of children. See judgment in *Matchwick* v. *Cock*, 3 Ves. 611, where after-born children were admitted to participate in a provision for maintenance out of income in favour of 'children' generally though the disposition of the property itself, out of which the income was to arise (and the objects of which, it might be presumed, were intended to be the same as those of the maintenance provision), was confined to the existing children." (Note by Mr. Jarman.) See *Freemantle* v. *Taylor*, 15 Ves. 363.

(*q*) *Re Pickup's Trusts*, 1 J. & H. 389.

her whether those others should be by the present or any future husband of her sister."

"Shall happen to die."

Sir W. Grant thought (*r*) that a gift over, in case certain persons "*shall* happen to die in my lifetime," though strictly importing futurity, might be understood as speaking of the event at whatever time it may happen, whether before or after the will; applying the rule that the prior limitation being, by what means soever, out of the case, the subsequent limitation takes place.

Intention to exclude existing children.

But the context may require expressions of this kind to be construed strictly as importing a future time (*s*). Thus, in *Early* v. *Benbow* (*t*), where a testator gave legacies of £500 each to A, B, C, and D, four of the grandchildren of his brother Henry, and by a codicil bequeathed £500 "to each child *that may be born* to either of the children of either of my brothers lawfully begotten": it appeared that at the date of the codicil and of the testator's death, there were living, to his knowledge, several grandchildren of his brothers besides A, B, C, and D (and for whom no provision was made except by the codicil), and several children of brothers, one at least of which brothers survived the testator. Under these circumstances, Knight-Bruce, V.-C., held that none of the legatees named in the will was intended to take any benefit by the codicil so as to give double legacies; and appeared to entertain an opinion equally adverse to all grandchildren living at the date of the codicil, although not named. Romilly, M.R., before whom the latter point was afterwards argued (*u*), decided it in conformity with that opinion: he thought it was concluded in principle by the previous decision, in which he concurred. And both decisions were upheld by the Court of Appeal (*x*).

The authorities were examined by Stirling, J., in *Locke* v. *Dunlop* (*y*), where there were strict limitations in tail to the testator's second, third, fourth, fifth, and every other son and sons to be begotten, born, or *en ventre sa mère* at the time of his decease; it was held that the eldest son was excluded.

Express gift to posthumous child, or child *en ventre*.

It seems that if a testator expressly provides that in the event of a child of his being born after his death, his property shall go to that child, a child born in his lifetime (although an

(*r*) In *Christopherson* v. *Naylor*, 1 Mer., at p. 325. See also *Re Sheppard's Trust*, 1 K. & J. 269.

(*s*) It seems that in a will devising land in strict settlement the words "who shall be born in my lifetime," *prima facie*, apply only to persons born after the date of the will: *Gibbons* v. *Gibbons*, 6 App. Cas. 471.

(*t*) 2 Coll. 342. And see *Wilkinson* v. *Adam*, 1 V. & B. pp. 422, 468.

(*u*) *Early* v. *Middleton*, 14 Bea. 453.

(*x*) *Townsend* v. *Early*, 3 D. F. & J. 1, affirming 28 Bea. 429.

(*y*) 39 Ch. D. 387. The decision was affirmed by the C. A.

only child and born after the date of the will) cannot take under the gift (z). There is, however, authority the other way (a).

Children born after date of will excluded.

Conversely, a gift to "children" may appear from the context to be confined to children previously named in the will, so as to exclude after-born children (b).

Words "born" and "begotten" do not exclude after-born children.

Mr. Jarman continues (c): "The preceding citation from Lord Coke has anticipated the observation (which properly finds a place here), that a gift to children 'born' (d) or 'begotten' will extend to children coming *in esse* subsequently to the making of the will, and even after the death of the testator, where, the time of distribution under the gift being posterior to that event, the gift would, by the general rule of construction, include such after-born children.

"Thus, where (e) a testator bequeathed certain funds to trustees in trust for his wife for life, and after her decease, in trust to transfer the same unto and among all and every the child and children lawfully *begotten* of the testator's nephews and niece by their then or their late respective wives and husband: Sir J. Leach, V.-C., held, that the bequest comprehended after-children. Indeed, his Honor's decision in their favour, seems to have been carried so far as to let in children born after the death of the widow, which was the period of distribution; in which respect the decision is clearly untenable (f).

Legacy to every child E *hath* extended to future children.

"So, in the case of *Ringrose* v. *Bramham* (g), children born in the interval between the making of the will and the death of the testator were let in under a bequest to A's children; '£50 to every child he *hath* by his wife E, to be paid to them by my

(z) *Doe* v. *Haslewood*, 10 C. B. 544, *ante*, p. 653. As to the effect of a devise to a posthumous child, see *post*, p. 1677.

(a) See *White* v. *Barber*, 5 Burr. 2703; 2 Amb. 701; *Re Lindsay*, 5 Ir. Jur. 97. In *Goodfellow* v. *Goodfellow*, 18 Bea. 356, a testator made a bequest in favour of his children T. and J. and the children or child of which his wife was then enceinte; the child so referred to was born, and four years later another son; the testator subsequently made a codicil confirming his will. Romilly, M.R., held that the fourth son was included. The decision is a little difficult to justify, as the gift was to *personæ designatæ*, and not to a class.

(b) *Ante*, p. 1636.

(c) First ed. Vol. II, p. 102.

(d) The expression "born in due time" generally refers to the period of gestation, but in *Re Wass*, [1882] W. N. 158, Kay, J., put a somewhat artificial construction on the words.

(e) *Browne* v. *Groombridge*, 4 Mad. 495.

(f) The case is badly reported; it would seem from the argument of counsel that the fund was not divisible on the death of the wife, but at some later period. Unless this was so the decision is unintelligible, because the wife died two months before the testator.

(g) 2 Cox, 384. See also *Doe* d. *Burton* v. *White*, 1 Ex. 526; 2 Ex. 797, where, however, the only question was whether an immediate gift to "children who have issue," included children who had no issue until after testator's death; and it was held that it did not, but meant "have at testator's death." Compare *Goodfellow* v. *Goodfellow*, *supra*, note (a).

executors as they shall come of age.' It was even contended that the bequest extended to children born after the death of the testator and before the majority of the eldest; and the Master of the Rolls (Sir R. P. Arden) rested his objection to this construction, not solely on the force of the word 'hath,' but on other grounds; particularly that it would have the effect of postponing the distribution of the general residue, until the number of pecuniary legatees could be ascertained.

"It is not to be inferred, however, that because the Courts in the preceding cases have refused to allow the claims of after-born children to be negatived by expressions of a loose and equivocal character, they would deny all effect to words studiously inserted with the design of restricting a gift to children to existing objects, though the reason or purpose of the restriction may not be apparent: as in the instance of a gift to children 'now living,' which we have seen is confined to children in existence at the date of the will" (*h*). And effect has sometimes been given to the word "born" or "begotten" by considering it as intended to apply to illegitimate children born or *en ventre* at the date of the will, where otherwise the word would have been inoperative (*i*).

Gift to children "born" or "living" at a time named.

And here it may be observed that, under a devise to children *born* at a particular time, children take a vested interest immediately on their birth, not subject to be divested by death before the specified period (*k*). But it is otherwise, of course, if the gift is to children *living* at the time. In *Fox* v. *Garrett* (*l*), where the gift was to A for life, and if he should die (as he did) without children, then to the children of B and C, who should be living at the decease of himself, the testator, and A; it was held that this meant living at the death of the survivor of the testator and A.

Gift to children surviving testator or another person.

In *Re Clark's Estate* (*m*), a gift to A for life and after her death to "all and every the children of the said A who shall survive me," was held to include children born after the death of the testator, while in *Gee* v. *Liddell* (*n*), where a similar construction would have made a gift over void for remoteness, Romilly, M.R., held that the word "survive" imported that the person to survive, must be living at the death of the person who is to be survived (*o*).

(*h*) *Vide ante*, p. 378.
(*i*) See *post*, p. 1754.
(*k*) *Paterson* v. *Mills*, 18 L. J. Ch. 449.
(*l*) 28 Bea. 19.
(*m*) 3 D. J. & S. 111; *Re Sing*, [1914] W. N. 90.
(*n*) L. R. 2 Eq. 341.
(*o*) As to the construction of the word "surviving," see Chap. LV.

The question whether a child who is *en ventre* at a particular time can be considered a child "born" at that time, is considered in the next Section.

Whether "born" means "procreated."

(H) As to children "en ventre," Mr. Jarman continues (*p*): "It should be observed, that in the application of the preceding rules, and indeed, for all purposes of construction, a child *en ventre sa mère* is considered as a child *in esse* (*q*). This was finally established in the case of *Doe* v. *Clarke* (*r*), which was an ejectment directed by Lord Thurlow, in consequence of a difference of opinion between his Lordship and Sir Lloyd Kenyon, M.R., on the claim of a posthumous child under a gift to all the children of C who should be *living* at the time of his death; his Lordship maintained the competency, and his Honor the incompetency, of the child *en ventre sa mère* to take as a 'living' child (*s*).

Children *en ventre*, when included.

Held to take as objects *living* at a given period.

"The case of *Clarke* v. *Blake* afterwards came before Lord Loughborough (*t*), on the equity reserved, and his Lordship, in conformity to the decision of the Court of Common Pleas, held the posthumous child to be entitled. Indeed, so completely is the point now set at rest, that the claim of a child *en ventre sa mère* under a bequest 'to the child and children begotten and to be begotten on the body of A, who should be *living* at B.'s decease,' was admitted *sub silentio* in the much-discussed case of *Mogg* v. *Mogg* (*u*).

"It being thus settled that children *en ventre* were entitled under the description of children *living*, the only doubt that remained was whether they would be held to come under the description of children *born*; and that question also has been decided in the affirmative (*x*). The result then is to read the words 'living,' and 'born,' as synonymous with *procreated*;

Child *en ventre* entitled under description of children *born*.

(*p*) First ed. Vol. II, p. 103.

(*q*) Subject to the limitations stated below, p. 1678.

(*r*) 2 H. Bl. 399. Other cases are *Doe* v. *Lancashire*, 5 T. R. 49; *Long* v. *Blackall*, 7 T. R. 100; *Blackburn* v. *Stables*, 2 V. & B. 367, and the authorities cited *post*. See also *Millar* v. *Turner*, 1 Ves. Sen. 85 (marriage articles).

(*s*) *Clarke* v. *Blake*, 2 B. C. C. 320; overruling *Pierson* v. *Garnet*, 2 B. C. C. 38; *Cooper* v. *Forbes*, *ib.* 63; *Freemantle* v. *Freemantle*, 1 Cox, 248.

(*t*) 2 Ves. Jun. 673.

(*u*) 1 Mer. 654. See also *Rawlins* v. *Rawlins*, 2 Cox, 425. "These cases demonstrate that the distinction laid down in *Northey* v. *Strange*, 1 P. W. 341, between a devise to children generally, and to children living at a given period, with reference to the admission of children *en ventre*, is unfounded; nor would it have been deemed worthy of remark had not the case been cited by a recent writer (1 Belt's Ves. 113, Editor's note) without an explicit denial of its authority." (Note by Mr. Jarman.)

(*x*) *Trower* v. *Butts*, 1 S. & St. 181. See also *Whitelock* v. *Heddon*, 1 B. & P. 243.

and, to support a narrower signification of such terms, words pointedly expressive of an intention to employ them in a special and restricted sense must be used.

Whether children *en ventre* take under a gift to *relations;*

"It should be observed, that in *Bennett* v. *Honywood* (*y*) Lord Apsley considered that the admission of children *en ventre* was confined to devises to children, and refused to let in such a child under a devise to relations. This decision does not appear to have been expressly overruled; but it is conceived that the present doctrine, and the principle upon which the late cases have proceeded, that a child *en ventre sa mère* is for all purposes a child in existence, and even *born*, conclusively negative any such distinction" (*z*).

—under a devise to A and his children.

It has also been suggested (*a*), that a child *en ventre* is not a child in existence for the purpose of applying the second branch of the rule in *Wild's Case* (*b*), according to which, if one devises land to A and his children, and A has children at the time of the devise, they take jointly with A. But the case did not require a decision on this point.

Child "living."

It seems that a child *en ventre* is considered as a child "living" at a particular time, whether it is for the child's benefit to be so considered or not. Thus, in *Re Burrows* (*c*), where there was a gift to B absolutely, "in case she has issue living at the death of A," and B was delivered of a living child the day after A's death, Chitty, J., held that B took absolutely.

Child *en ventre* is not considered "born" except for its own benefit.

The rule of construction that a child *en ventre* comes under the description of a child *born*, prevails wherever it makes the unborn child an object of gift, or of a power of appointment (*d*), or prevents a gift to it (*e*), or an estate otherwise vested in it, as by descent (*f*), from being divested. But it is limited to cases where the unborn child is benefited by its application. Thus, in *Blasson* v. *Blasson* (*g*), where a testatrix directed a fund to be accumulated, and when the youngest of the children of A, B and C who should have been born and should be living at her death should attain twenty-one, to be divided among

(*y*) Amb. 708.

(*z*) See acc. Sugd. Pow. 653 (8th ed.), *Re Gardiner's Estate*, L. R. 20 Eq. 647 (gift to brothers and sisters) is *contra*, and obviously wrong; see *Re Hallett*, [1892] W. N. 148. The rule also applies where the word used is "issue": *Re Burrows*, [1895] 2 Ch. 497, below.

(*a*) By Kelly, C.B., *Roper* v. *Roper*, L. R. 3 C. P., at p. 35.

(*b*) *Post*, p. 1864.

(*c*) [1895] 2 Ch. 497, following the dictum of Lord Eldon in *Thellusson* v. *Woodford*, 11 Ves., at p. 149, in which he comments on the case of *Gulliver* v. *Wickett*, 1 Wils. 105. See *Villar* v. *Gilbey*, [1907] A. C. 139.

(*d*) *Re Farncombe's Trusts*, 9 Ch. D. 652.

(*e*) *Pearce* v. *Carrington*, L. R. 8 Ch. 969.

(*f*) *Burdet* v. *Hopegood*, 1 P. W. 486, and see other cases cited, 1 S. & St., pp. 182, 183.

(*g*) 2 D. J. & S. 665.

such of the children of A, B and C, as should then be living: two children who were *en ventre* at the death of the testatrix were held by Lord Westbury not to be "born and living" at her death, because, although by holding them to be then born and living, the period of accumulation would have been extended, and the class of children consequently enlarged, that construction was not needed for the purpose of admitting the individuals who were *en ventre* to share in the fund.

After some difference of judicial opinion, this doctrine has been conclusively established as a general rule of construction (*h*). Consequently, a son *en ventre* at the testator's death does not come within the operation of a clause cutting down the estate tail of every son "born" in the testator's lifetime (*i*).

"Born previously" to date of will.

And even if the gift is to a class of relations "born previously to the date of this my will," this does not show an intention on the part of the testator to confine the benefit of the bequest to persons of whose existence he knew, so as to exclude a person *en ventre* at the date of the will and born afterwards (*k*).

Where number stated in will excludes child *en ventre*.

The fact that a child is *en ventre* at the date of the will may influence the construction in cases where the fact explains what might otherwise be uncertain or ambiguous (*l*).

Rule against Perpetuities.

A child *en ventre* is considered as a child *in esse* for the purpose of deciding a question of remoteness under the Rule against Perpetuities (*m*).

Contingent remainders.

An exception to the general doctrine with reference to children *en ventre* formerly prevailed in the case of contingent remainders, by reason of the technical rule which required that the feudal possession should never be vacant. This exception was abolished by stat. 10 & 11 Will. 3, c. 16, which enables posthumous children to take estates limited "by marriage and other settlements," as if born in their father's lifetime (*o*).

If a testator bequeaths to each of his children a legacy with interest to be computed from the day of his death, a child *en ventre* at the testator's death is only entitled to interest from the time of his or her birth (*p*).

(*h*) *Villar* v. *Gilbey*, [1905] 2 Ch. 301; [1906] 1 Ch. 583; [1907] A. C. 139; *Re Burrows*, [1895] 2 Ch. 497.

(*i*) *Ib.*

(*k*) *Re Salaman*, [1908] 1 Ch. 4.

(*l*) *Re Emery's Estate*, 3 Ch. D. 300, *post*, p. 1686.

(*m*) *Re Wilmer's Trusts*, [1903] 2 Ch. 411. See *ante*, p. 269.

(*o*) This Act may have been passed in consequence of the discussion in *Luddington* v. *Kime*, 1 Ld. Raym. 203. As to the decision in *Reeve* v. *Long*, 1 Salk. 227, see *ante*, p. 628.

(*p*) *Rawlins* v. *Rawlins*, 2 Cox. 425.

CHAPTER XLII.

Posthumous heir not entitled to intermediate rents.

In case of intestacy, a posthumous heir is not entitled to the intermediate rents; they belong to the qualified heir (*q*).

Child illegitimate at period of distribution cannot take although afterwards legitimated.

In *Re Corlass* (*r*), a testator left property to A for life, and afterwards to his lawful issue : one of A's daughters married ten days after her father's death and had a child about six months afterwards : it was held that this child, although legitimate at the time of its birth, was illegitimate at the period of distribution, and therefore could not take.

(I) *Where Children Take in Default of Appointment.*—Where property is given to children, expressly or by implication, subject to a power of appointment which is not exercised, the class to take in default of appointment is ascertained according to the following rules (*s*).

Rules for ascertaining class taking in default of appointment.

(i) Under a direct gift to children, subject to a power of appointment, all the children living at the death of the testator take, to the exclusion of those born afterwards (*t*). The same rule applies where the gift to the children in default is implied (*u*).

(ii) Under a gift to A for life with a direct gift in remainder to his children in such shares as he shall appoint, all of A's children take who are living at the testator's death, or born afterwards, whether the power of appointment is exercisable by deed or will, or by will only (*x*). But where there is no direct gift to the children, then only those can take by implication, in default of appointment, who could have taken under the power. Therefore, if the power is to appoint by deed or will, those children take who are living at the testator's death, or are born during A's lifetime (*y*), unless the power is confined to children living at A's death, in which case only those children

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(*q*) *Thellusson* v. *Woodford*, 4 Ves., at p. 335; *Richards* v. *Richards*, Johns. 754; *Goodale* v. *Gawthorne*, 2 Sm. & G. 375.

(*r*) 1 Ch. D. 460.

(*s*) As to the rules for ascertaining classes of relations, next-of-kin, etc., see Chap. XLI, *ante*.

(*t*) *Coleman* v. *Seymour*, 1 Ves. Sen. 209.

(*u*) *Longmore* v. *Broom*, 7 Ves. 124. *Brown* v. *Higgs*, and other cases on the implication arising from powers of selection or distribution are referred to *ante*, pp. 629 *seq.*

(*x*) *Casterton* v. *Sutherland*, 9 Ves. 445; *Pattison* v. *Pattison*, 19 Bea. 638; *Grieveson* v. *Kirsopp*, 2 Kee. 653; *Lambert* v. *Thwaites*, L. R. 2 Eq. 151; *Wilson* v. *Duguid*, 24 Ch. D. 244. The dictum of Lord Langdale in *Woodcock* v. *Renneck*, 4 Bea., at p. 196, is erroneous (L. R. 2 Eq., at p. 158), but the decision itself is correct.

(*y*) *Kennedy* v. *Kingston*, 2 J. & W. 431; *Faulkner* v. *Lord Wynford*, 15 L. J. Ch. 8; *Wilson* v. *Duguid*, 24 Ch. D. 244 (settlement). As to *Brown* v. *Pocock*, 6 Sim. 257; see L. R. 2 Eq., at p. 157. In all these cases it is assumed that there is no gift over in default of appointment, which would, of course, negative the implication, *ante*, p. 629.

take who survive A (*z*). On the other hand, if the power is merely testamentary, only those children take by implication who survive A (*a*).

(iii) It sometimes happens that the tenant for life and the donee of the power are different persons. In such a case, where there is a direct gift to the children, it would seem, on principle, that the class includes the children living at the testator's death and those born during the lifetime of the tenant for life. If, however, the donee of the power is required to exercise a discretion in selecting fit members of the class (as where property is given to A for life and after his death upon trust for such of a class as B shall think fit, for the interest and good of the testator's family), and the donee of the power predeceases the tenant for life, then the class is ascertained at the death of the tenant for life (*b*). The same rule seems to apply if the donee of the power survives the tenant for life (*c*). But if the power is not exercisable until A's death, and all the children predecease him, no gift to the children can be implied (*d*).

Where there is a power of appointment to issue and a gift "in default of such appointment such issue to take equally as tenants in common"; all issue to whom appointments could have been made take, whether they live to the period of distribution or not (*e*).

Re Chartres.

In *Re Chartres* (*f*), the testator disposed of his income for twenty-one years and then gave two-fifths of his residue in trust for R.'s children or remoter issue as R. should by will appoint, and in default in trust for all R.'s children who being sons should attain twenty-one or being daughters should attain that age or marry. R. had a son A. who attained twenty-one shortly after the expiration of the twenty-one years period (*g*). R. released his testamentary power, and subsequently A. died. Held that the class in default of appointment was closed, so that R. having

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(*z*) *Stolworthy* v. *Sancroft*, 33 L. J. Ch. 708; *Re White's Trusts*, Johns. 656; *Carthew* v. *Enraght*, 20 W. R. 743; *Re Phene's Trusts*, L. R. 5 Eq. 346. See also *Re Shaw*, 56 Sol. J. 380. As to *Winn* v. *Fenwick*, 11 Bea. 438, see L. R. 2 Eq., at p. 160.

(*a*) *Walsh* v. *Wallinger*, 2 R. & M. 78, and other cases cited *ante*, p. 630, but as to *Kennedy* v. *Kingston*, 2 J. & W. 431, and *Freeland* v. *Pearson*, L. R. 3 Eq. 658, see *Re Jackson's Will*, 13 Ch. D. 189. As to what words will create a testamentary power, see *ante*, p. 768.

(*b*) *Re White's Trusts*, Johns. 656; *Re Phene's Trusts*, L. R. 5 Eq. 346. A different explanation of the *ratio decidendi* in this case is suggested in *Wilson* v. *Duguid*, 24 Ch. D. 244. Compare *Moore* v. *Ffolliot*, 19 L. R. Ir. 499.

(*c*) *Carthew* v. *Enraght*, 20 W. R. 743. See *ante*, p. 1621.

(*d*) *Halfhead* v. *Shepherd*, 28 L. J. Q. B. 248; *Moore* v. *Ffolliot*, *supra*.

(*e*) *Re Hutchinson*, 55 L. J. Ch. 574.

(*f*) [1927] 1 Ch. 466.

(*g*) The headnote refers to A having attained twenty-one within the period.

released the power, A.'s executors were entitled, but *semble* if the power had not been released the class might have been kept open during R.'s life.

Rule where number of children is erroneously referred to.

III.—Misstatement as to Number of Children.—Mr. Jarman continues (*h*): "It often happens, that a gift to children describes them as consisting of a specified number, which is less than the number found to exist at the date of the will. In such cases it is highly probable that the testator has mistaken the actual number of the children; and that his real intention is, that all the children, whatever may be their number, shall be included. Such, accordingly, is the established construction, the numerical restriction being wholly disregarded. Indeed, unless this were done, the gift must be void for uncertainty, on account of the impossibility of distinguishing which of the children were intended to be described by the smaller number specified by the testator.

Gift to A's *three* children, there being four, held to comprehend *all*.

"Thus, in *Tomkins* v. *Tomkins* (*i*), where a testator, after bequeathing £20 to his sister, gave to her *three* children £50 each; and the legatee had *four:* Lord Hardwicke held that they were *all* entitled.

"So, in *Scott* v. *Fenoulhett* (*k*), a bequest to C. of £500 'and the like sum to each of his daughters, if *both* or *either* of them should survive Lady C.,' was held to belong to *three* daughters who were living when the will was made. It was contended, in this case, that the bequest was intended for two daughters who resided very near the testator, the third living at a great distance from him; but as the point had not previously been raised in the cause, and it appeared that the testator knew the last-mentioned daughter, Lord Thurlow refused an inquiry.

Bequest to the *two* daughters of T., there being three.

"Again, in *Stebbing* v. *Walkey* (*l*), where a testator bequeathed certain stock unto the '*two* daughters of T. in equal shares' during their lives; and if *either* of them should die, then to pay the whole to the survivor during her life, and

(*h*) First ed. Vol. II, p. 108. In all the editions before the 6th this section is preceded by a section dealing with the question whether a substitutional gift to the children of a legatee dying before the period of distribution is subject to the same contingency of survivorship. So much of that section as is still of practical importance has been incorporated in Chap. XXXVI.

(*i*) Cit. 2 Ves. sen., at p. 564, cit. 3 Atk. p. 257, and stated from the Register's Book, 19 Ves. p. 126; *Morrison* v. *Martin*, 5 Hare, 507; *Spencer* v. *Ward*, L. R. 9 Eq. 507; *Re Bassett's Estate*, L. R. 14 Eq. 54. See the same principle applied to bequests to servants, in *Sleech* v. *Thorington*, 2 Ves. sen. 560.

(*k*) 1 Cox, 79, cit. 2 B. C. C. 85, where it is erroneously stated to be a bequest to *two* daughters.

(*l*) 2 B. C. C. 85; 1 Cox, 250; *Lee* v. *Pain*, 4 Hare, at p. 249; *Lee* v. *Lee*, 10 Jur. (N.S.) 1041.

in case *both* should depart this life, then the whole to fall into the residue. T. had *three daughters*, all of whom were held to be entitled; the M.R., Sir Lloyd Kenyon, declaring, that he yielded to the authority of the cases, and not to the reason of them.

Pecuniary legacy given to *three*, held that the fourth took one of equal amount.

"So, in *Garvey* v. *Hibbert* (*m*), Sir W. Grant, on the authority of the last case, held *four* children to be entitled under a bequest 'to the *three* children of D.' of £600 each. In this case a question arose whether, in the adoption of this construction, the aggregate amount of the three legacies was to be divided among the four, or each of the four was to take a legacy of the same amount as was given to each of the three: the counsel for the legatees contended only for the former; but the M.R., on the authority of *Tomkins* v. *Tomkins* (*n*), adopted the latter construction."

Gift to *four* with a blank as if for names, there being five.

And in *M'Kechnie* v. *Vaughan* (*o*), where £500 was bequeathed "to each of my four nieces the daughters of my late brother A," and at the date of the will there were five, Sir W. James, V.-C., held that each of the five was entitled to a legacy of £500. It was argued that the blank showed an intention to select particular nieces, and that this not being effectually done, the gift was void for uncertainty; but the V.-C. thought that the blank was much more probably due to the testator being ignorant of the state of the family, and was not enough to take the case out of the general rule.

Division into *eight*, there being seven objects only.

A numerical mistake was also corrected in *Berkeley* v. *Palling* (*p*), where a testator directed his property to be "divided into *eight* equal shares, and disposed as follows among the children of A and B," and then proceeded to give to some two shares, and to others one, but enumerating seven shares only; Lord Gifford, M.R., considering that this was evidently a mistake, held that the property should be divided into seven shares.

Where number specified in will exceeds actual number.

Mr. Jarman continues (*q*): "In cases the converse of the preceding, *i.e.*, where the number of children mentioned in the will exceeds the actual number, of course there is no hesitation in holding all the children to be entitled (*r*); and, in [*Lord Selsey* v. *Lord Lake* (*s*),] a trust for the five daughters of the

(*m*) 19 Ves. 125.
(*n*) *Ante*, p. 1682.
(*o*) L. R. 15 Eq. 289.
(*p*) 1 Russ. 496.
(*q*) First ed., Vol. II, p. 109.
(*r*) So held in *Re Sharp*, [1908] 2 Ch. 190; see also *Re Dutton*, [1893] W. N. 65. In *Re Sharp* the gift was to "the six children of A" and it took effect in favour of one. See *Re Whiston*, [1923] 2 Ch. 253; [1924] 1 Ch. 122, where the rule did not operate.
(*s*) 1 Bea. p. 151.

CHAPTER XLII.

"To the *five* daughters of E." there being one daughter and five sons.

testator's niece, E. [and the survivors and survivor of them], was held to apply to a daughter of E. (and who was the only daughter at the date of the will), and not to sons, of whom there were five at the date of the will; it being considered, it should seem, that the mere correspondence of number was not sufficient to indicate that the word 'daughters' was written by mistake for *sons*."

To the four sons of A, there being three sons and one daughter.

But, in *Lane* v. *Green* (*t*), under a bequest of £100 each to the four sons of A, A having, in fact, three sons and a daughter; Knight-Bruce, V.-C., thinking it clear that the testator intended to give four legacies of £100, held the daughter entitled to a legacy as well as the sons.

The case of *Harrison* v. *Harrison* (*u*) presents an example both of overstatement and of understatement of the true number; the bequest being to "the two sons and the daughter of T. L., £50 each." There were one son and five daughters living at the date of the will, all of whom were held to be entitled.

Testator's knowledge of the real number does not affect the rule.

The ground on which the Court has proceeded is that it is a mere slip in expression (*x*), and the circumstance that the testator knows the true number of children is not a sufficient reason for departing from the rule. Thus, where a testatrix bequeathed to the three children of her niece A, £500 each, knowing that A had nine children, all the children were held entitled to a legacy (*y*). Evidence was offered that when A had only three children, the testatrix being aware of that fact, had made a will in the terms stated above, and had, in the intervals after the births (of which she was regularly informed) of a fourth and ninth child, made a second and third will, and finally the will which was in question; and all these wills were in the same words. But Knight-Bruce, V.-C., thought that assuming the admissibility of the evidence (which he purposely avoided deciding), it was not sufficient to exclude the claim of the six younger children.

Rule inapplicable unless there is uncertainty in the objects.

And in *Yeats* v. *Yeats* (*z*), where a testator bequeathed £40 a year "to each of the seven children now living of A": it was proved that a year before the date of the will the testator had been informed, as the fact was, that A then had seven children. But in the interval two more were born; and it was held, that the general rule must prevail, and that all nine were entitled to annuities.

(*t*) 4 De G. & S. 239.
(*u*) 1 R. & My. 71. And see *Hare* v. *Cartridge*, 13 Sim. 165.
(*x*) *Per* Grant, M.R., 19 Ves., at p. 126.
(*y*) *Daniell* v. *Daniell*, 3 De G. & S. 337; *Scott* v. *Fenoulhett*, 1 Cox. 79.
(*z*) 16 Bea. 170. Criticised by Jessel, M.R., in *Newman* v. *Piercey*, 4 Ch. D. 41, *post*, p. 1686.

But, as was implied in the very statement of the rule, it is not applicable where the context, with such aid if any from extrinsic facts as may be necessary and admissible, points out which of the children the testator intended to describe by the smaller number. There is then no uncertainty, and the presumption of mistake and the consequent rejection of the numerical restriction are inadmissible. Thus, a gift equally among "my four nephews and niece, namely, A, B, C, and D," there being four nephews besides D the niece, was held to include only those named (*a*). So where the testator gave a legacy to the two grandchildren of A, adding, "they live at X," and A had three grandchildren, but only two lived at X, it was held that only these two were entitled (*b*).

Gift to four, there being four of one marriage and two of another.

Again, in *Hampshire* v. *Peirce* (*c*), where a testatrix gave £100 "to the four children of my late cousin E. B., equally to be divided; if any of them should die under twenty-one or unmarried, their share or shares shall go to the survivors of them"; at the date of the will there were living two children of E. B. by P. a former husband, both then of age, and four children by B., all infants, and it was urged that "four" ought to be rejected. But Sir J. Strange, M.R., said, "I should have had some doubt if it had not so entirely corresponded with the circumstances and situation of the family at that time. Here were not six children by one and the same husband, as it was in *Tomkins* v. *Tomkins*, but two broods of children by different husbands; therefore it was natural, in pointing out the number, to understand her pointing out that particular brood of number four; and so there is not that uncertainty as if all the children had been by the same husband." He also adverted to the clause of survivorship if any should die under twenty-one, which the P. children could not, being both of age. It must be observed that the M.R. thought there was still some uncertainty left, and that to remove it he admitted evidence of declarations by the testatrix that she intended the four B. children only. "It may be well doubted," said Lord Abinger, in *Doe* v. *Hiscocks* (*d*), "whether this was right, but the decision on the whole case was undoubtedly correct; for the circumstances of the family, and their ages, which no doubt were admissible, were quite sufficient

(*a*) *Glanville* v. *Glanville*, 33 Bea. 302. So a gift "to all the children of A, namely," etc., was confined to those named, in *Re Hull's Estate*, 21 Bea. 314.

(*b*) *Wrightson* v. *Calvert*, 1 J. & H. 250. So a gift to "five unmarried daughters" was confined to the two daughters (out of three) who were unmarried; *Re Dutton*, [1893] W. N. 65.

(*c*) 2 Ves. sen. 216.

(*d*) 5 M. & W., at p. 371, *ante*, p. 500.

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to have sustained the judgment without the questionable evidence" (*e*).

Newman v. *Piercey.*

So, in *Newman* v. *Piercey* (*f*), where a testatrix bequeathed "to Mrs. Walden, widow of the late William Walden, £100, and to each of her three children a like sum of £100"; at the date of the will there was no person answering the description "Mrs. W.," etc., consequently parol evidence of the circumstances was admissible to explain that. This evidence showed that William Walden, a half brother of the testatrix, had died leaving a widow and three children; and that she had since married P. and (as the testatrix knew) had *some* children by him. It was held by Sir G. Jessel that the P. children did not answer the description in the will, for at no period of their lives could they be described as the children of "Mrs. W., widow of the late W. W.": they were the children of Mrs. P. and not of the widow of W. Taking the description and the evidence together, he thought it clear that the children of Mrs. W., by W. W., were alone intended to take. One of those three was dead at the date of the will, but it appeared probable, and was assumed, that she did not know it: as far as she knew, there were still three.

But where the gift is to the two children of W. by his late wife, and W. has four children by his late wife, two of whom are daughers, the mere fact that the bequest is to the "two children" on their respectively attaining twenty-one, or marrying, is not sufficient to confine it to the two daughters (*h*).

Illegitimate children.

In *Re Mayo* (*i*), the gift was to "the three children of A born prior to her marriage": A had four such children, but the testator had only acknowledged the paternity of the three younger children, and there was no evidence that he was aware of the existence of the eldest: it was held that the eldest was not included.

Where number agrees with actual number of children born at date of will.

"Of course," as Mr. Jarman points out (*k*), "if the number mentioned by the testator agree with the number existing at the date of the will, there is no ground for extending the gift to after-born children (*l*).

(*e*) The question of the admissibility of evidence of intention was discussed by Farwell, J., in *Re Mayo*, [1901] 1 Ch. 404.

(*f*) 4 Ch. D. 41. It is singular that *Hampshire* v. *Peirce*, 2 Ves. sen. 216, was not cited in this case.

(*h*) *Re Groom*, [1897] 2 Ch. 407.

(*i*) [1901] 1 Ch. 404.

(*k*) First ed., Vol. II, p. 110.

(*l*) *Sherer* v. *Bishop*, 4 B. C. C. 55. And the fact that a child is *en ventre* at the date of the will does not affect the construction, if the number of children actually born agrees with the number mentioned by the testator. *Re Emery's Estate*, 3 Ch. D. 300.

Gift to testator's *seven* children, naming only *six*, there being in fact eight.

"On the same principle as that which governed the preceding cases, it has been decided, that where (*m*) a testator bequeathed the residue of his personal estate to be divided equally among his *seven* children, A, B, C, D, E, and F, (naming only *six*,) and it turned out that he had eight children when he made his will, but from other parts of his will it appeared that he considered one of his children as fully provided for; the *seven* other children were entitled."

To the children of A and B, or to A and the children of B.

IV.—Gift to Children of several Persons—Distribution per stirpes or per capita.—The general rule is thus stated by Mr. Jarman (*n*): "Where a gift is to the children of several persons, whether it be to the children of A and B (*o*), or to the children of A and the children of B (*p*), they take *per capita*, not *per stirpes*." So if the gift is to A and the children of B (*q*). Thus, in *Kekewich* v. *Barker* (*r*), the gift was to G. B., M. B., and the children now living of R. H. who shall attain twenty-one, etc., and if more than one in equal shares; there were four children of R. H., who had all attained twenty-one: it was held that the fund was divisible in equal sixths between G. B., M. B., and the four children of R. H.

To "my brother A and the children of my brother B."

"The same rule applies, where a devise or bequest is made to a person described as standing in a certain relation to the testator, and the children of another person standing in the same relation, as to 'my brother A and the children of my brother B' (*s*); in which case A takes only a share equal to that of one of the children of B, though it may be conjectured that the

(*m*) *Humphreys* v. *Humphreys*, 2 Cox, 184. See also *Garth* v. *Meyrick*, 1 B. C. C. 30; *Eddels* v. *Johnson*, 1 Giff. 22.

(*n*) First ed., Vol. II, p. 111.

(*o*) *Weld* v. *Bradbury*, 2 Vern. 705; *Lugar* v. *Harman*, 1 Cox, 250; *Pattison* v. *Pattison*, 19 Bea. 638; *Armitage* v. *Williams*, 27 *ib.* 346; *Mason* v. *Baker*, 2 K. & J. 567: *Peacock* v. *Stockford*, 3 D. M. & G. 73. A gift "to the children of A and B" is ambiguous; in the cases cited the ambiguity was removed by the context or the circumstances; see *post*, p. 1694.

(*p*) *Lady Lincoln* v. *Pelham*, 10 Ves. 166; see also *Barnes* v. *Patch*, 8 Ves. 604; *Walker* v. *Moore*, 1 Bea. 607; *Bolger* v. *Mackell*, 5 Ves. 509; *Eccard* v. *Brooke*, 2 Cox, 213; *Heron* v. *Stokes*, 2 D. & War. 89. *Fletcher* v. *Fletcher*, 9 L. R. Ir. 301 (deed).

(*q*) *Butler* v. *Stratton*, 3 B. C. C. 367; *Dowding* v. *Smith*, 3 Bea. 541; *Rickabe* v. *Garwood*, 8 Bea. 579; *Paine* v. *Wagner*, 12 Sim. 184; *Amson* v. *Harris*, 19 Bea. 210.

(*r*) 88 L. T. 130; *S. C.* nom. *Capes* v. *Dalton*, 86 L. T. 129.

(*s*) *Blackler* v. *Webb*, 2 P. W. 383 (A and B were in fact sons, not brothers of the testator); *Hyde* v. *Cullen*, 1 Jur. 100; *Lenden* v. *Blackmore*, 10 Sim. 626; *Tomlin* v. *Hatfeild*, 12 Sim. 167; *Tyndale* v. *Wilkinson*, 23 Bea. 74. *Fletcher* v. *Fletcher*, 9 L. R. Ir. 301; *Payne* v *Webb*, L. R. 19 Eq. 26. In *Blackler* v. *Webb*, Lord King, C., said that A and the children of B "should each of them take *per capita*, as if all the children had been named by their respective names." This is not to be understood as limiting the class of children capable of taking to those living at the date of the will; on the contrary, the general rule applies by which all children born before the period of distribution are admitted to share: *Dowding* v. *Smith*, 3 Bea. 541; *Lenden* v. *Blackmore*, 10 Sim. 626; *Cooke* v. *Bowen*, 4 Y. & C. 244.

testator had a distribution according to the statute in his view. And of course it is immaterial that the objects of gift are the testator's own children and grandchildren; as where (*t*) a legacy was bequeathed 'equally between my son David and the children of my son Robert.'" So if the gift be to A and B and their children, or to a class and their children, or to the children and grandchildren of A, every individual coming within the terms of the description, as well children as parents, will take an equal proportion of the fund; that is, the distribution will be made *per capita* (*u*).

A direction that the parents and children are to be classed together and share in equal proportions, puts the question beyond doubt (*v*).

Construction where context indicates different intention.

"But this mode of construction," as Mr. Jarman remarks, "will yield to a very faint glimpse of a different intention in the context. Thus the mere fact, that the annual income, until the distribution of the capital, is applicable *per stirpes*, has been held to constitute a sufficient ground for presuming that a like principle was to govern the gift of the capital" (*w*). And the same effect was held by Knight-Bruce, V.-C., to be produced by the share of one *stirps* being, in the case of its failure before the period of distribution, given over to the others, *per stirpes* (*x*). And a residue given to the children of a testator's son and daughters, A, B, C, and D, was held by Shadwell, V.-C., to be divisible *per stirpes*, by reason of a gift over of the shares of any of the son and daughters (who had previous life-interests) dying without leaving issue, to the survivors and their issue (*y*). By this clause the testator showed he did not intend a distribution *per capita*, since, in that case, the whole residue would, by force of the original gift, have gone among the children of those

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But see *Parkinson's Trust*, 1 Sim. (N.S.) 242; where, however, the point seems not to have been noticed. *Scott* v. *Scott*, 15 Sim. 47, went apparently with the rule in *Wild's Case*.

(*t*) *Williams* v. *Yates*, 1 C. P. Coop. 177.

(*u*) *Cunningham* v. *Murray*, 1 De G. & S. 366; *Abbay* v. *Howe*, *ib.* 470; *Northey* v. *Strange*, 1 P. W. 340; *Murray* v. *Murray*, 3 Ir. Ch. Rep. 120; *Law* v. *Thorp*, 27 L. J. Ch. 649; *Re Fox's Will*, 35 Bea. 163; *Cancellor* v. *Cancellor*, 2 Dr. & S. 194; *Barnaby* v. *Tassell*, L. R. 11 Eq. 363. So where a gift is implied from a power to appoint to children *or* issue: *Re White's Trusts*, Joh. 656. As to the question whether the parents take an equal share with their children, or a life interest in the whole with remainder amongst the children, see *post*, pp. 1873 *seq.*

(*v*) *Turner* v. *Hudson*, 10 Bea. 222.

(*w*) *Brett* v. *Horton*, 4 Bea. 239; see *Crowe* v. *Odell*, 1 Ba. & Be. 449; 3 Dow. 61; *Overton* v. *Banister*, 4 Bea. 205. It is hardly necessary to say that a direction that children are to take their parents' share imports a division *per stirpes*: *Shand* v. *Kidd*, 19 Bea. 310.

(*x*) *Nettleton* v. *Stephenson*, 18 L. J. Ch. 191. See also *Archer* v. *Legg*, 31 Bea. 187. *Ayscough* v. *Savage*, 13 W. R. 373.

(*y*) *Hawkins* v. *Hamerton*, 16 Sim. 410.

who had children in equal shares (*z*). But an inference of this kind will not control a clear gift. Thus, if property is given to "all the children of A, B, and C in equal shares and proportions," the fact that so long as A, B, and C or any of them are living the income is divisible *per stirpes*, is not of itself sufficient to prevent the ultimate division of the capital from being *per capita* (*a*). Those cases in which property is given to two or more persons for their lives, with remainder to their children, are referred to in detail below.

In *Re Walbran* (*b*), where the property was to be equally divided between the children of A and B or their heirs, Joyce, J., held that one half went to A's children and the other half to B, the word "between" implying a division into two parts (*c*).

In *Re Harper* (*d*) the words were "to be divided equally between the unmarried daughters of my brothers-in-law Dr. H. and Dr. G. equally." Dr. H. had five daughters, of whom three were unmarried. Dr. G. had one daughter aged four. Held that the gift was to Dr. G. personally and that the fund was divisible in fourths between Dr. G. and the three unmarried daughters of Dr. H.

Substitutional gift.

Children will also generally take *per stirpes* where the gift to them is substitutional, as in the case of a bequest to several or their children (*e*).

Quasi-substitutional gift.

And even where the gift is not, strictly speaking, substitutional by reason of some of the first takers being dead at the date of the will, or by reason of some of the children being expressly excluded from participation in the gift, the fact that the original legatees are to be taken into account in the distribution of the property may show that the primary division is to be *per stirpes* (*f*).

(*z*) *Smith* v. *Streatfield*, 1 Mer. 358; *Bolger* v. *Mackell*, 5 Ves. 509; *Armitage* v. *Ashton*, 20 L. T. 102 (combined effect of will and codicil).

(*a*) *Nockolds* v. *Locke*, 3 K. & J. 6; *Re Stone*, [1895] 2 Ch. 196, in which the Court of Appeal declined to follow *Brett* v. *Horton*, 4 Bea. 239.

(*b*) [1906] 1 Ch. 64, *post*, p. 1693, followed in *Re Prosser*, [1929] W. N. 85. In *Hawes* v. *Hawes*, 14 Ch. D. 614 (a settlement of land by deed), the stocks were distinguished.

(*c*) See the notes to *Malcolm* v. *Martin*, 3 Br. C. C. 50, where it seems to have been assumed that the word "betwixt" did not produce a division *per stirpes*.

(*d*) [1914] 1 Ch. 70.

(*e*) *Price* v. *Lockley*, 6 Bea. 180; *Burrell* v. *Baskerfield*, 11 Bea. 525; *Congreve* v. *Palmer*, 16 Bea. 435; *Timins* v. *Stackhouse*, 27 *ib.* 434; *Re Cleland's Trusts*, 7 L. R. Ir. 74; *Re Battersby's Trusts*, [1896] 1 Ir. R. 600, where the children took as joint tenants. But see *Atkinson* v. *Bartrum*, 28 Bea. 219.

(*f*) *Gowling* v. *Thompson*, L. R. 11 Eq. 366 n.; *Minchell* v. *Lee*, 17 Jur. 727, stated *ante*, p. 1566, n. (*x*); *Davis* v. *Bennett*, 4 D. F. & J. 327, stated *ante*, p. 1564.

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To A and B for their lives, remainder to their children.

This question often arises upon devises or bequests to two or more persons for their lives, with remainder to their children. The conclusion then depends in a great measure upon whether the tenants for life take jointly or as tenants in common. If the latter, then, as the share of any one will, on his decease, go over immediately, without waiting for the other shares, it is probable that the testator intended it to continue separate and distinct from the other shares, and consequently, to devolve on the children *per stirpes*.

First, where A and B are tenants in common.

Accordingly, where property is given to A, B, and C for their lives as tenants in common, and " afterwards " or " at their death " it is given to their children in equal shares, this is generally construed to mean that " at their deaths " it is to go to their respective children; that is, the division is *per stirpes* (*g*). The rule applies to substitutional gifts (*h*). But of course this construction is inadmissible if the income is expressly disposed of until the death of all the tenants for life, and the capital is then given to all the children in equal shares (*i*); in such a case the division will be *per capita*, unless there are words in the ultimate gift requiring a division *per stirpes* (*k*).

Contrary intention.

And in any case an intention that the children should take *per capita*, however improbable, must of course prevail if clearly indicated. Thus, in *Stephens* v. *Hide* (*l*), where a portion of the residue was bequeathed in trust for the testator's two daughters for their lives, as tenants in common, " and afterwards to their

(*g*) See accordingly *Pery* v. *White*, Cowp. 777; *Taniere* v. *Pearkes*, 2 S. & St. 383; *Willes* v. *Douglas*, 10 Bea. 47; *Flinn* v. *Jenkins*, 1 Coll. 365; *Arrow* v. *Mellish*, 1 De G. & S. 355; *Doe* d. *Patrick* v. *Royle*, 13 Q. B. 100; *Re Laverick's Estate*, 18 Jur. 304; *Bradshaw* v. *Melling*, 19 Bea. 417; *Hunt* v. *Dorsett*, 5 D. M. & G. 570; *Coles* v. *Witt*, 2 Jur. (N.S.) 1226; *Ayscough* v. *Savage*, 13 W. R. 373; *Waldron* v. *Boulter*, 22 Bea. 284; *Re Notts*, 26 L. T. 679; *Turner* v. *Whitaker*, 23 Bea. 196; *Archer* v. *Legg*, 31 Bea. 187; *Milnes* v. *Aked*, 6 W. R. 430; *Wills* v. *Wills*, L. R. 20 Eq. 342; *Re Hutchinson's Trusts*, 21 Ch. D. 811.

In the third edition of this work, by Messrs. Wolstenholme and Vincent, it was pointed out, as an argument in favour of a division *per stirpes*, " it would follow that the different shares would go to different classes of children; for, after the death of the tenant for life who first died, another might have more children, who would certainly be entitled to participate in a share of any tenant for life who died afterwards." On the other hand it must be remembered that if the *stirpital* construction is adopted, and one of the tenants for life dies without issue, there may be an intestacy as to his share; and this is not allowed to affect the construction: *Re Campbell's Trusts*, 33 Ch. D. 98.

(*h*) *Re Errington*, [1927] 1 Ch. 421, where the rule is stated by Romer, J.

(*i*) As in *Nockolds* v. *Locke*, 3 K. & J. 6, and *Re Stone*, [1895] 2 Ch. 196. See also *Re Rubbins*, 78 L. T. 218; 79 L. T. 313, where " after the death of A, B, and C " was held to mean after the death of all of them.

(*k*) As in *Re Campbell's Trusts*, 33 Ch. D. 98, where the gift was to the children of " each " of the tenants for life.

(*l*) Ca. t. Talb. 27. But see *Waldron* v. *Boulter*, 22 Bea. 284. In *Smith* v. *Streatfield*, 1 Mer. 358, Sir W. Grant, M.R., after some hesitation, felt bound by the explicit language of the will.

or either of their child or children," and for default of such issue, over; one of the daughters died leaving a son, and the other without children; and it was held that the son was entitled to the whole fund, since the testator had used plain words to show his intent, that whether there was one or more children, in either case the child or children should take the whole. So, in *Abrey* v. *Newman* (*m*), where a testator bequeathed property "to be equally divided between A and B for the period of their natural lives after which to be equally divided between their children, that is to say, the children of A and B above named," Romilly, M.R., held that on the death of A one half of the fund was divisible *per capita* among the children of both A and B: he thought the last words of the bequest prevented him from reading the preceding words as their "respective" children (*n*). And in *Swabey* v. *Goldie* (*o*), the Court of Appeal held that the argument *ab inconvenienti*, on which the decisions in *Willes* v. *Douglas* and similar cases are based, does not apply to a will which has been carefully framed and is free from ambiguity. The cases of *Pearce* v. *Edmeades* (*p*) and *Stevenson* v. *Gullan* (*q*) are also examples of the *per capita* construction following almost inevitably from the language of the will.

Where remainder is given to children of some only of the tenants for life.

Where the property is given to several for life and afterwards to the children of some only of the tenants for life, the children are entitled *per capita*. So, where a testator gave property, the interest to be divided among four named persons for their lives, and the property to "devolve" on the children of three of those persons equally, it was held, that on the death of each of the tenants for life their shares, then set free, went over at once to the children of the three *per capita* (*r*). In such a case it is obvious that there may be some additional members of the class at the time each share falls in, but that is an inconvenience (if it be one) which frequently arises on wills of this description (*s*).

Secondly, where A and B are joint tenants.

On the other hand, if the tenants for life take jointly, or (which is for this purpose equivalent) as tenants in common with express or implied survivorship, the whole subject of the devise remains undivided until the death of the survivor, and then goes

(*m*) 16 Bea. 431. See also *Peacock* v. *Stockford*, 3 D. M. & G. 73.

(*n*) In *Sarel* v. *Sarel*, 23 Bea. 87, the gift was to the grandchildren by name. In *Wills* v. *Wills*, L. R. 20 Eq. 342, the property was, at the death of A and B, "to be divided equally between the children of A and B," which makes the case also indistinguishable from *Abrey* v. *Newman*, 16 Bea. 431.

(*o*) 1 Ch. D. 380.

(*p*) 3 Y. & C. 246, stated *post*, p. 1774.

(*q*) 18 Bea. 590.

(*r*) *Swan* v. *Holmes*, 19 Bea. 471.

(*s*) *Per* Romilly, M.R., *ibid.*, at p. 478.

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over in a mass. In this case there is but one period of distribution, and presumably one class of objects; who therefore *prima facie* take *per capita* (*t*).

Successive generations.

Sometimes grandchildren as well as children are referred to in the gift. Thus, in *Barnaby* v. *Tassell* (*u*), the gift was to the brothers of A for life, with remainder to their children and grandchildren; it was held that the families of the brothers took *per stirpes*, but that the children and grandchildren of each brother took *per capita inter se*. If, however, there is a substitutional gift to children or grandchildren, with a reference to the share which the parent or grandparent would have been entitled to if living, no grandchild can take in competition with its parent (*x*).

"Children and their issue."

A gift to "the children of A and their issue" *prima facie* means the descendants of A living at the period of distribution, *per capita* (*y*). But the word "and" sometimes has the effect of making a gift to issue substitutional (*z*).

To the younger sons of J. and S., J. having none.

Mr. Jarman continues (*a*): "Where (*b*) a testator bequeathed his 'fortune' to be equally divided between any second or younger sons of his brother J. and his sister S.; and in case his said brother and sister should not leave any second or younger son, the testator gave and bequeathed his said fortune to his said brother and sister; it was held that there being no son of J., and but one younger son of S., such younger son took the whole.

Gift to A and B's children.

"Here it may be observed, that where the gift is to A and B's children, or to 'my brother and sister's children,' (the possessive case being confined to B and the sister,) it is read as a gift to A and the children of B, or to the brother and the children of the sister, as it strictly and properly imports, and not to the respective children of both, as the expression is sometimes inaccurately used to signify (*c*).

(*t*) *Parker* v. *Clarke*, 6 D. M. & G. 104; *Parfitt* v. *Hember*, L. R. 4 Eq. 443; *Taaffe* v. *Conmee*, 10 H. L. C. 64; *Begley* v. *Cook*, 3 Drew. 662. It seems doubtful whether *Malcolm* v. *Martin* (3 B. C. C. 50) is now a binding authority, having regard to *Arrow* v. *Mellish*, 1 De G. & S. 355, and *Wills* v. *Wills*, L. R. 20 Eq. 342, *supra*, n. (*m*).

(*u*) L. R. 11 Eq. 363.

(*x*) *Palmer* v. *Crutwell*, 8 Jur. (N.S.) 479; *Powell* v. *Powell*, 28 L. T. 730; *Re Orton's Trust*, L. R. 3 Eq. 375. Compare *Ross* v. *Ross*, 20 Bea. 645, *ante*, p. 1570.

(*y*) *Lea* v. *Thorp*, 27 L. J. Ch. 649; *Cancellor* v. *Cancellor*, 2 Dr. & S. 194.

(*z*) See Chap. XXXVI, *ante*, pp. 1291 *seq.*

(*a*) First ed., Vol. II, p. 112.

(*b*) *Wicker* v. *Mitford*, 3 Br. P. C. 442. See *Malcolm* v. *Martin*, 3 Br. C. C. 50.

(*c*) See *Doe* d. *Hayter* v. *Joinville*, 3 East, 172. "If, however, A and B were husband and wife (as if the bequest were to John and Mary Thomas's children), no doubt the construction would be different; it would apply to the children of both." (Note by Mr. Jarman.)

"So a bequest of a residue to be divided among 'the children of my late cousin A, and my cousin B, and their lawful representatives,' has been held to apply to B, not to his children" (*d*).

The rule is, perhaps, laid down too widely by Mr. Jarman. It has no doubt been said by eminent Judges that the proper grammatical meaning of a gift "to the children of A and B" is "to B and the children of A" (*e*), on the theory that if the testator had intended to indicate the children of B he ought to have said: "to the children of A and of B" (*f*); but, on the other hand, if he had intended to indicate B individually, he ought to have said: "to the children of A and to B" (*g*). The cases in which a gift "to the children of A and B" has been held to refer to B individually seem all to have been decided on special grounds. In *Lugar* v. *Harman* (*h*), the circumstance that A was dead at the date of the will, made it reasonable to infer that this was the reason why the testator gave a share of the property to A's children, but there was no apparent reason why he should give the other share to the children of B who was living (*i*).

"To the children of A and B."

In *Re Featherstone's Trusts* (*k*), the testator, among other legacies, gave a legacy to "the children of A" by name, and another legacy to B, and gave the residue of his property "unto and equally amongst all the children of the said A and the said B"; it was held that this meant B individually and not his children. Again, in *Re Walbran* (*l*), a testatrix directed property "to be equally divided between the children of F. W. and J. W. or their heirs." F. W. and J. W. were nephews of the testatrix. F. W. had six children, but for some years before the date of the will he had deserted his wife and children: J. W. had two children. It was held, first, that the gift was to J. W. and the children of F. W., and secondly, that J. W took one half and the children of F. W. the other.

Re Walbran.

(*d*) *Lugar* v. *Harman*, 1 Cox, 250. See also *Re Ingle's Trusts*, L. R. 11 Eq. pp. 578, 590 (where the construction was aided by a reference to "the legacy left to B"); and *Trail* v. *Kibblewhite*, 12 Sim. 5, where a gift to "the aunts of A and his sister B" was held not to entitle B to a legacy.

(*e*) Assuming, of course, that A and B are not husband and wife: *supra*, note (*c*), and *per* Joyce, J., in *Re Walbran*, [1906] 1 Ch., at p. 66.

(*f*) *Peacock* v. *Stockford*, 3 D. M. & G. 73, where the gift was for the benefit of the children of every deceased tenant for life and "of" the survivors or survivor of the other tenants for life; it was held that the word "of" referred to "children." *Re Walbran*, *supra*.

(*g*) *Per* Wood, V.-C., in *Mason* v. *Baker*, 2 K. & J., at p. 570.

(*h*) 1 Cox, 250.

(*i*) The same argument justifies the decision in *Hawes* v. *Hawes*, 14 Ch. D. 614 (voluntary settlement); *Re Davies' Will*, 29 Bea. 93, may be disregarded; see *post*, n. (*n*).

(*k*) 22 Ch. D. 111. This was a special case and not of general application: see *Re Whiston*, [1924] 1 Ch. 122, 127, 131, 134.

(*l*) [1906] 1 Ch. 64.

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Where there is no reason to prefer one parent.

But where there is nothing to show that the testator meant to draw a distinction between the two persons named in the gift—and *a fortiori* where he shows an intention to treat them equally—it seems that the proper construction of a gift " to the children of A and B " is that it means the children of both. Thus, in *Mason* v. *Baker* (*l*), the testator gave equal legacies to A and B, his brother and sister, and gave his residue " to all the children of my brother A and my sister B, to be equally divided amongst them, share and share alike," it was held by Wood, V.-C., that the children of both took in equal shares. The construction would apparently have been the same even if no legacies had been given to A and B (*m*). Whether the construction would have been different if A had been a relation of the testator, and B a stranger in blood, may be doubted (*n*).

Gift explained by state of facts.

Sometimes the construction of a gift " to the children of A and B " is made clear by the circumstances. Thus, if at the date of the will and the testator's death neither A nor B has a child, the gift takes effect in favour of the children which both or either may at any time have (*o*). So if A is living but B is, to the knowledge of the testator, dead leaving children, the gift must mean " the children of A and the children of B " (*p*).

Whether dying without children means *having* or *leaving* a child.

V.—Limitation over, as referring to having or leaving Children.—Mr. Jarman continues (*q*): " Another subject of inquiry is, whether a gift over, in case of a prior devisee or legatee dying without *children* (*r*), means without *having had* or without *leaving* a child.

Upon A and B both dying without children.

" In *Hughes* v. *Sayer* (*s*), a testator bequeathed personalty to A and B, and upon either of them dying without children, then to the survivor; and if both should die without children, then over; and it was held to mean children living at the death. The great question in this case was, whether the word ' children '

(*l*) 2 K. & J. 567.

(*m*) See *per* Lord Eldon in *Lincoln* v. *Pelham*, 10 Ves., at p. 176: " A bequest to the younger children of A and to the younger children of B means the same exactly as a bequest to the younger children of A and B."

(*n*) This was the case in *Stummvoll* v. *Hales*, 34 Bea. 124, where, however, the decision seems to have been turned on a misconception of *Lugar* v. *Harman*. As Jessel, M.R., observed in *Hawes* v. *Hawes*, 14 Ch. D. 614, the decisions in *Re Davies* and *Stummvoll* v. *Hales* may be set off against one another.

(*o*) *Weld* v. *Bradbury*, 2 Vern. 705, generally cited on another point: *ante*, p. 1663.

(*p*) *Per* Joyce, J., in *Re Walbran*, [1906] 1 Ch., at p. 66.

(*q*) First ed., Vol. II, p. 112.

(*r*) " Of course this question *may* arise where the person, whose issue is referred to, is not the prior legatee, but it happens rarely to have presented itself in such a shape." (Note by Mr. Jarman.)

(*s*) 1 P. W. 534.

was not used as synonymous with *issue* (*t*) indefinitely, in which case the bequest over would have been void; and the M.R. seems to have thought that, whether it meant *issue* or *children*, it referred to the period of the death (*u*).

"So, in the case of *Thicknesse* v. *Liege* (*x*), where a testator devised the residue of his estate in trust for his daughter for life, and after her decease among her issue, the division to be when the youngest should attain twenty-one; and if any of them should be then dead, leaving lawful issue, the guardian of such issue to take his or her share. *But if his daughter happened to die without any child*, or the youngest of them should not arrive to twenty-one, and none of them should have left issue, then over. The testator's daughter at the time of his death had one child, who had four children, but they, as well as their mother, all died in the lifetime of the daughter, so that she died without leaving issue at her death; and it was held that the devise over took effect."

And this construction has been adopted when, in another part of the will, the testator has used words signifying death without having ever had any children (*y*).

Whether principle in favour of vesting affects construction.

Where the gift is to A absolutely, with a gift over in the event of his dying without child or children, there being no gift to the child or children, the general principle in favour of absolute vesting as soon as possible affords an argument for construing the gift over as intended to take effect only if A never has a child, so that the gift to him becomes indefeasible as soon as a child is born. But in a case of this kind (*z*), Byrne, J., refused to allow the construction of the will to be affected by the principle referred to, and held that "die without child or children" meant die without leaving a child or children (*a*).

"Children" held to mean "issue."

Where land is devised to A absolutely, subject to a gift over in the event of his dying without child or children, it seems that A takes an estate in fee simple, defeasible in the event of his

(*t*) As to which, see *Doe* d. *Smith* v. *Webber*, 1 B. & Ald. 713, and *ante*, p. 1634. See also *Doe* d. *Blesard* v. *Simpson*, 3 Scott, N. R. 774; 3 M. & Gr. 929; *Doe* d. *Simpson* v. *Simpson*, 5 Sc. 770; 4 Bing. (N.C.) 333; *Bacon* v. *Cosby*, 4 De G. & S. 261 (started *post*, pp. 1881-2).

(*u*) But see *Massey* v. *Hudson*, 2 Mer. 130.

(*x*) 3 B. P. C. Toml. 365.

(*y*) *Jeffreys* v. *Conner*, 28 Bea. 328. In *Re Hambleton*, [1884] W. N. 157, the words "die without children" were read as meaning "die without having had a child," but the decision is unintelligible.

(*z*) *Re Booth*, [1900] 1 Ch. 768.

(*a*) Under the Conveyancing Act, 1882, s. 10 (now replaced by section 134 of the Law of Property Act, 1925), A's estate would become indefeasible on a child attaining twenty-one, whether it survived A or not, *ante*, p. 1407, n. (*l*), and the Court made a declaration that the original legatee was absolutely entitled, subject to the gift over in the event of her not having any child who should survive her, or attain twenty-one in her lifetime, but as to this declaration see above in text.

leaving no issue living at his death (*b*), "child or children" being treated as equivalent to "issue."

There is authority for saying that the same construction applies in the case of personalty. The point was taken, but not decided, in *Hughes* v. *Sayer* (*c*). In *Re Synge's Trusts* (*d*), however, where the gift over was to take effect in the event of the original legatee dying without leaving children, "children" was held to mean "issue." If this principle is correct, it would seem that the declaration made in *Re Booth* (*e*) was premature, for the child of the original legatee might die in her lifetime before attaining twenty-one, leaving issue surviving the original legatee, and then the case would resemble *Re Synge's Trusts*.

"Without children" importing indefinite failure of "issue."

Cases have occurred in which a testator under the old law has devised land to A for life or some other limited interest, with an executory devise to take effect in the event of his dying without children, and this has been held to give A an estate tail, "children" being treated as equivalent to "issue," and the gift over being held to import an indefinite failure of issue (*f*). It was probably on this ground that Knight-Bruce, V.-C., decided *Bacon* v. *Cosby* (*g*); there a testator, who died in 1837, gave his real and personal estate to his daughter, with a gift over in case of her dying without children, and it was held that the daughter took an estate tail in the realty and an absolute interest in the personalty.

"Without having children," how construed.

"But the words *without having children*," as Mr. Jarman points out (*h*), "are construed to mean, as they obviously import, without having *had* a child.

"Thus, in the case of *Weakley* d. *Knight* v. *Rugg* (*i*), where leasehold property was bequeathed to A, 'and in case she died without *having* children,' over; it was held that the legatee's interest became indefeasible on the birth of a child.

"In *Wall* v. *Tomlinson* (*k*), a residue which was given to A 'in case she should have legitimate children, in failure of which,' over, was held to belong absolutely to A on the birth of a child, who died before the parent. 'Failure' here evidently referred not to the child, but to the event of 'having children.'"

(*b*) *Parker* v. *Birks*, 1 K. & J. 156, in which the earlier cases of *Wyld* v. *Lewis*, 1 Atk. 432; *Doe* v. *Webber*, 1 B. & Ald. 713; and *Raggett* v. *Beaty*, 5 Bing. 243, are cited, *post*, p. 1698.

(*c*) *Ante*, p. 1694.

(*d*) 3 Ir. Ch. 379, *post*, p. 1698.

(*e*) *Ante*, p. 1695, n. (*a*).

(*f*) See *Raggett* v. *Beaty*, 5 Bing. 243, *post*, p. 1880.

(*g*) 4 De G. & S. 261.

(*h*) First ed., Vol. II, p. 113.

(*i*) 7 T. R. 322. See also *Findon* v. *Findon*, 1 De G. & J. 380; *Jeffreys* v. *Conner*, *supra*.

(*k*) 16 Ves. 413.

In *Bell* v. *Phyn* (*l*), where the bequest was to the testator's three children A, B, and C, but in case of the death of any of them without being married and having children, then over, Grant, M.R., held that the share of A was absolutely vested in her upon the birth of a child.

In *Stone* v. *Maule* (*m*), the bequest was to A absolutely, with a gift over in the event of his dying without having any child or children; he died without ever having had a child; it was argued that "child or children" was synonymous with "issue," and that A (the will being subject to the old law) consequently took absolutely (*n*), but it was held that the gift over took effect.

Word "leaving" refers to period of death.

Mr. Jarman continues (*o*): "The word *leaving* obviously points at the period of death (*p*). Thus a gift to such children or issue as a person may leave, is held to refer to the children or issue who shall survive him, in exclusion of such objects as may die in his lifetime; and this construction was applied in a recent case (*q*) to a gift to the lawful issue of A and B, or of such of them as should *leave* issue, the latter words being considered as explaining, that the word 'issue,' in the first part of the sentence, meant those who were left by the parent; the consequence of which was, that the children who did not survive the parents, were not entitled to participate with those who did."

Whether "children" can be read "issue."

It is hardly necessary to say that the rules above stated as applicable to those cases where the gift is to A absolutely, with a gift over in the event of his dying without children (where "without children" means "without leaving children") (*r*), apply to those cases where the gift over is expressly made to take effect in the event of A dying without leaving children: in such a case the gift to A does not become indefeasible on his having a child (*s*). Whether the gift over takes effect on the death of A leaving no child, but only remoter issue, is another matter. The following is the present state of the authorities.

(*l*) 7 Ves. 453. "Without being married" was construed to mean "without having ever been married"; and the word "and" as "or," *ante*, pp. 588 *seq.*

(*m*) 2 Sim. 490.

(*n*) Apparently on the ground which prevailed in *Bacon* v. *Cosby*, 4 De G. & S. 261, *ante*, p. 1696.

(*o*) First ed., Vol. II, p. 114.

(*p*) See *Read* v. *Snell*, 2 Atk., at p. 647.

(*q*) *Cross* v. *Cross* (1834), 7 Sim. 201.

(*r*) *Ante*, pp. 1694-5.

(*s*) *Re Ball*, 40 Ch. D. 11 ("without leaving issue male"); *Armstrong* v. *Armstrong*, 21 L. R. Ir. 114 ("leaving no family") both cited *post*, p. 1701.

Realty.

Where land is devised to A absolutely, subject to a gift over in the event of his dying and leaving no child or children, "child or children" is read as meaning "issue," so that the gift over does not take effect if A leaves issue living at his death (*t*).

Personalty.

In *Re Synge's Trusts* (*u*), there was a bequest of personalty to A absolutely, with a gift over if she died without leaving children; she died leaving no child, but a grandchild, living at her death; it was held that "children" meant "issue," and that the gift over failed. The decision seems correct. In *Re Booth* (*w*), which at first sight appears to be inconsistent with it, the point did not arise.

In case of two persons, husband and wife, leaving no children.

Mr. Jarman continues (*y*): "Where the gift over is in the event of *two* persons, husband and wife, not leaving children, the question arises, whether the words are to be construed, in case both shall die without leaving a child living at the death of *either*, or in case both shall die without leaving a child, who shall survive *both*.

"As in the case of *Doe* d. *Nesmyth* v. *Knowls* (*z*), where the devise was to *William Smyth* and *Mary* his wife, and the survivor of them, during their lives, then to Mary their daughter, or, if more children by *Mary*, equal between them; and, *in case they leave no children*, to their heirs and assigns for ever; it was held, that the fee simple became vested under the last devise, when the survivor of *William* and *Mary* (namely William), died leaving no children of their marriage surviving him, though a child was living at the death of Mary, Mr. Justice Bayley, observing—'they cannot be said to leave no children till both are gone.'

Distinction where they are not husband and wife.

"If the several persons, on whose decease without children the gift over is to take effect, be not husband and wife, the obvious construction is to read the words as signifying, 'in case each or every such person shall die without leaving a child living at his or her own respective decease,' supposing, of course, that the testator is not contemplating a marriage between these persons, and their having children, the offspring of such marriage; a question which can only arise when the persons are of different sexes and not related within the prohibited degrees of consanguinity; for the law will not presume that a marriage between such persons, *i.e.*, an illegal marriage, was in the testator's contemplation."

(*t*) *Doe* v. *Webber*, 1 B. & Ald. 713; *Doe* v. *Simpson*, 4 Bing. N. C. 333; *S. C.* in Cam. Sc. 3 M. & Gr. 929. See *Parker* v. *Birks*, 1 K. & J. 156, *ante*, p. 1696. In *Mathews* v. *Gardiner*, 17 Bea. 254, the point did not arise.

(*u*) 3 Ir. Ch. R. 379.

(*w*) [1900] 1 Ch. 768, *ante*, p. 1695.

(*y*) First ed., Vol. II, p. 115.

(*z*) 1 Barn. & Ad. 324.

"Leaving" sometimes construed "having," so as not to divest previous gift.

An important exception to the general rule is thus stated by Mr. Jarman (*a*): "Although, as we have seen, the word 'leaving' *prima facie* points to the period of death, yet this term, like all others, may receive a different interpretation by force of an explanatory context. Where a gift over is to take effect in case of a prior legatee for life, whose children are made objects of gift, dying without *leaving* children, it is sometimes construed as meaning, in default of objects of the prior gift, even though such gift should not have been confined to children living at the death of the parent."

Maitland v. *Chalie.*

Mr. Jarman does not cite any authority in support of this proposition, but it is well established. Besides the favour always shown to provisions for children, it requires very strong words to defeat a prior vested gift (*b*). Thus, in *Maitland* v. *Chalie* (*c*), where a testator bequeathed a sum of money in trust for his daughter S. for life, and after her death, as to a moiety thereof, for her children equally to be divided between them at their respective ages of twenty-one, and if but one, then to that one at twenty-one, with maintenance during minority; and if any of such children should die before attaining twenty-one, his share to go to the survivors; but in case S. should die without *leaving* any child or children, or leaving such and they should die before attaining twenty-one, then to testator's next-of-kin living at the death of the longer liver of them his said daughter and her children so dying under age. S. had issue two daughters who attained twenty-one, but died in their mother's lifetime. Sir J. Leach, V.-C., said, "A clear vested gift is in the first place given to the children of a daughter attaining twenty-one. If in the clause which gives the property over on failure of her children, the word 'having' be read for 'leaving,' the whole will will express a consistent intention to that effect. I feel myself bound by the authorities to adopt this construction." Then, citing *Woodcock* v. *Duke of Dorset*, and *Powis* v. *Burdett* (*d*), he declared that the two daughters having attained twenty-one took vested interests (*e*).

If there is a gift by will to A for life, and after A's death to his children in terms which would give them an absolute interest

(*a*) First ed., Vol. II, p. 114.

(*b*) 8 Jur. 14. The doctrine was originally applied to settlements, in order to give younger children a vested interest in their portions on attaining twenty-one, and is therefore sometimes referred to as the rule in *Emperor* v. *Rolfe*, 1 Ves. sen. 208, or the rule in *Howgrave* v. *Cartier*, 3 V. & B. 79.

(*c*) 6 Mad. 243.

(*d*) *Post*, p. 2111.

(*e*) This statement of *Maitland* v. *Chalie*, and the sentence which immediately precedes it, were cited with approval by North, J., in *Re Ball*, 59 L. T. 800; *post*, p. 1701, from the 4th edition of this work, where they are to be found in Chap. XLIX, corresponding to Chap. LVII, *post*.

in A's lifetime, and then a gift over simply, " if A dies without leaving children," the word " leaving " is so to be construed as not to destroy any prior vested interest (*f*). The rule is not confined to the case in which the tenant for life stands *in loco parentis* to the legatee in remainder (*g*); nor does it necessarily make a difference that the testator himself knew of the existence of a child, and that his knowledge appears upon the face of the will (*h*).

In *Maitland* v. *Chalie* (*i*), a specified time for vesting was appointed, but, as appears from *Re Cobbold* (*k*), the appointment of a specified term for vesting, though it may strengthen the case (*l*), is not necessary : a simple gift in remainder to children (which by operation of law vests in them at birth) is enough to attract the rule (*m*).

Cases in which there is no ambiguity in the term used, as " without leaving any issue at the time of her decease " (*n*), or " should all his children die before himself " (*o*), are not within the rule. So also where the expression is " die without leaving any child her surviving " (*p*). It is curious that the word " surviving " should make a difference, because " leaving " must mean " leaving surviving."

Romer, J.'s statement of the rule.

In *Re Cobbold* (*q*), Romer, J., stated the rule as follows : " If you have a gift by will to A for life and after A's death to his children in terms which would give them an absolute interest in A's lifetime, and then you have a gift over simply in these terms, ' if A dies without leaving children ' you are to construe the expression ' leaving ' so as not to destroy any prior vested interest. In other words, you construe it as meaning ' without having a child who has attained a vested interest.' "

(*f*) *Re Cobbold*, [1903] 2 Ch. 299, as corrected [1915] 1 Ch. 837; *Re Thompson's Trust*, 5 De G. & S. 667; *Kennedy* v. *Sedgwick*, 3 K. & J. 540; *Re Brown's Trust*, L. R. 16 Eq. 239; *Lord Sondes' Will*, 2 Sm. & Gif. 416.

(*g*) *Casamajor* v. *Strode* (1843), 8 Jur. 14.

(*h*) *Re Cobbold*, *supra*.

(*i*) 6 Mad. 243.

(*k*) [1903] 2 Ch. 299. The errata in the report of this case are pointed out in *Re Davey*, [1915] 1 Ch. 837.

(*l*) See *Gibbons* v. *Langdon*, 6 Sim. 260.

(*m*) *Treharne* v. *Layton*, L. R. 10 Q. B. 459, in Ex. Ch. affirming Q. B. : *Re Bradbury*, 90 L. T. 824. See also *White* v. *Hill*, L. R. 4 Eq. 265; *Re Jackson's Will*, 13 Ch. D. 190; *Marshall* v. *Hill*, 2 M. & Sel. 608; *Barkworth* v. *Barkworth*, 75 L. J. Ch. 754. As to *Ex p. Hooper*, 1 Drew. 264, *vide post*, p. 1927.

(*n*) *Young* v. *Turner*, 1 B. & S. 550.

(*o*) *Chadwick* v. *Greenall*, 3 Giff. 221.

(*p*) *Re Hamlet*, 38 Ch. D. 183; 39 Ch. D. 426.

(*q*) [1903] 2 Ch. 299, at p. 304, as corrected [1915] 1 Ch. 847. *Re Hamlet*, 39 Ch. D. 426, was not cited. In that case the C. A. considered that the rule in *Hargrave* v. *Carter*, and not that of *Maitland* v. *Chalie*, was in question, but it is not easy to see why.

Rule does not necessarily apply where no gift to children.

The rule in *Maitland* v. *Chalie* does not necessarily apply to cases where the gift which is liable to be divested is not to the children, but to the person on whose death without leaving children the gift over is to take effect : as where property is given to A absolutely, followed by a gift over in the event of his dying without leaving children; here there is no gift to the children, and if A has no child, or has children who all predecease him, the gift over takes effect. To hold otherwise would be merely to alter the event upon which the divesting of a gift previously vested is to take place (*r*). But the rule applies if the result of reading the words " without leaving " as equivalent to " without having had " is to make the gift over fit in with the intention of the testator as previously expressed, and avoid divesting a previously vested gift (*s*).

Gift over of an annuity on death without leaving issue construed strictly.

And though the Courts, in their reluctance to take away from the children an interest previously vested, have often construed the word " leaving " as equivalent to " having had " in the case of a gift of a capital fund, that principle of construction is not applicable to the case of an annuity, which *ex vi termini* involves the notion of personal enjoyment. A gift over of an annuity on death without " leaving " a child must therefore be strictly construed (*t*).

" Leaving " not construed " having had " if prior gift to children is contingent.

So " without leaving " in the gift over will not be construed " without having had " if the prior gift is expressly made to depend upon the corresponding contingency of " leaving children." Thus, in *Bythesea* v. *Bythesea* (*u*), a testatrix bequeathed the residue of her personal estate in trust for her grandson for life, and after his decease, " in case he should leave any child or children," then in trust for all and every the child and children of her said grandson, to be paid and payable at twenty-one, and there was a gift over after the decease of the grandson, " in case he should not leave any such child or children "; the grandson had one child only, who attained twenty-one, and died in his lifetime; it was held that the gift over took effect.

But if one child survives parent, all will take;

It is plain from Lord Cranworth's observations that, if there had been several children, and only some or one of them had

(*r*) *Per* North, J. (affirmed by C. A.), in *Re Ball*, 59 L. T., at p. 800. The report of the judgment of Cotton, L.J., in this case in 40 Ch. D. 11 is misleading (see *Barkworth* v. *Barkworth*, 75 L. J. Ch. 754). The decision of Bacon, V.-C., in *White* v. *Hight*, 12 Ch. D. 751, is overruled. See also *Armstrong* v. *Armstrong*, 21 L. R. Ir. 114 (" leaving no family "); *Clay* v. Coles, 57 L. T. 682 (" without issue. ")

(*s*) As in *Re Bogle*, 78 L. T. 457, stated *ante*, p. 1344.

(*t*) *Re Hemingway*, 45 Ch. D. 453.

(*u*) 23 L. J. Ch. 1004, affirming Wood, V.-C., 17 Jur. 645. The will contained a declaration that the interests of the children should be considered vested, but it was held to be too ambiguous to affect the construction.

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survived the grandson, he would have been of opinion that all the children were entitled, the gift being to all the children generally, upon a contingency (*viz.* "leaving any child") which would have happened. And this appears to be the rule (*v*).

—unless excluded by context.

But if after introductory words importing contingency (as "in case he shall leave any child or children"), the gift itself is to *such* children, it is confined to those who themselves survive their parent (*x*). So, if the shares are expressly directed to vest at the death of the parent, the only possible question in such a case being whether "vested" is to bear its literal meaning (*y*). And if the issue of a child who predeceases the parent are expressly provided for, the case is said not to be within the reason of those in which there is no such provision, and in which the Court has therefore adopted a particular construction for the purpose of protecting the predeceasing child from loss of his share (*z*). To give to all the children, if only one survives the parent, but unless one survives to give to none, is not a probable intention, and full weight will be allowed to any indications of an intention to give only to such as themselves survive (*a*), especially if there is an accumulation of such indications (*b*).

In *Re Davey* (*c*), it was held that although "without leaving" might be construed "without having" in cases where such a construction was necessary in order to obviate the divesting of an otherwise actually vested interest, yet such a construction was not admissible for the sole purpose of rendering an ultimate gift over void for remoteness.

Gift over to issue of legatee dying leaving issue.

The general rule seems to be that if property is given to a person contingently on his attaining twenty-one, or the like, with a gift over to his issue in the event of his dying leaving issue, this means death at any time, and consequently the original gift does not vest indefeasibly unless and until he dies without leaving issue (*d*).

(*v*) *Boulton* v. *Beard*, 3 D. M. & G. 608 (no gift over), *ante*, p. 1363; *M'Lachlan* v. *Taitt*, 28 Bea. 407; 2 D. F. & J. 449. *Winn* v. *Fenwick*, 11 Bea. 438, *contra*, is questioned by Lord St. Leonards, Pow. 596 (8th ed.).

(*x*) *Sheffield* v. *Kennett*, 27 Bea. 207; 4 De G. & J. 593; *Re Watson's Trusts*, L. R. 10 Eq. 36. See also *Re Heath's Settlement*, 23 Bea. 193; *Jeyes* v. *Savage*, L. R. 10 Ch. 555. *Bryden* v. *Willett*, L. R. 7 Eq. 472, has not been followed.

(*y*) *Selby* v. *Whittaker*, 6 Ch. D. 239, *ante*, p. 1364, distinguished in *Re Stephens*, [1927] 1 Ch. 1.

(*z*) *Per* James, L.J., 6 Ch. D., at p. 249.

(*a*) *Wilson* v. *Mount*, 19 Bea. 292. See also *Stevens* v. *Pyle*, 30 Bea. 284; *Hedges* v. *Harpur*, 3 De G. & J. 129.

(*b*) *Selby* v. *Whittaker*, 6 Ch. D. 239, *supra*.

(*c*) [1915] 1 Ch. 837.

(*d*) *Re Schnadhorst*, [1902] 2 Ch. 234, following *O'Mahoney* v. *Burdett*, L. R. 7 H. L. 388, and distinguishing *Home* v. *Pillans*, 2 Myl. & K. 15. All these cases are referred to *post*, pp. 2103, 2107.

VI.—Gifts to Younger Children—Gifts excluding Eldest Son.—Mr. Jarman continues (*e*): "We are now to consider the construction of *gifts to younger children*, the peculiarity of which consists in this, that as the term *younger children* generally comprehends the branches not provided for of a family (younger sons being excluded by the law of primogeniture from taking by descent), the supposition that these are the objects of the testator's contemplation so far prevails, and controls the literal import of the language of the gift, that it has been held to apply to children who do *not* take the family estate, *whether younger or not* (*f*), to the exclusion of a child taking the estate, whether elder or not (*g*). Thus the eldest daughter, or the eldest son being unprovided for, has frequently been held to be entitled under the description of a younger child (*h*).

Where "younger" means "unprovided for."

"As where a parent, having a power to dispose of the inheritance to one or more of his children, subject to a term of years for raising portions for *younger children*, appoints the estate to a younger son, the elder will be entitled to a portion under the trusts of the term (*i*); and, by parity of reason, the appointee of the estate, though a younger son, will be excluded" (*k*).

So if land is devised to A for life, with remainder to his first and other sons in tail, charged with portions for his younger children: if the eldest son dies in A's lifetime without issue, the second son, having thus become the eldest, will not take a share of the portions, but the representatives of the deceased eldest son will (*l*).

A similar result follows where the gift is to all the testator's children, exclusive of an eldest son, or exclusive of a son (or child) entitled to the estate (*m*), but not (it seems) where the

Exclusion of eldest son or son entitled to estate.

(*e*) First ed., Vol. II, p. 116.

(*f*) *Chadwick* v. *Doleman*, 2 Vern. 528; *Beale* v. *Beale*, 1 P. W. 244; *Butler* v. *Duncomb*, *ib.* 448; *Heneage* v. *Hunloke*, 2 Atk. 456; *Pierson* v. *Garnet*, 2 B. C. C. 38.

(*g*) *Bretton* v. *Bretton*, Freem. Ch. 158, s. 204b; 3 Ch. Rep. 1; 1 Eq. Ca. Ab. 202, pl. 18. The intent to be imputed to the parties to a marriage settlement "is a desire to provide equality for the children, that one child should not take a double portion, and that no child should be excluded": *per* Lord Hatherley, L.C., in *Collingwood* v. *Stanhope*, L. R. 4 H. L., at p. 52.

(*h*) *Hall* v. *Luckup*, 4 Sim. 5. For the exceptions to the general rule, see *post*, p. 1705.

(*i*) *Duke* v. *Doidge*, 2 Ves. 203 n. See *L'Estrange* v. *Winniett*, [1911] 1 Ir. R. 62 (elder daughter).

(*k*) In such a case the younger son takes under the settlement; but if the settlement is revoked, and a new settlement made, the principle does not apply; see *Wandesford* v. *Carrick*, 5 Ir. R. Eq. 486, *post*, p. 1704.

(*l*) See *Ellison* v. *Thomas*, 1 D. J. & S. 18, and other cases cited *post*, p. 1709.

(*m*) See *Ellison* v. *Thomas*, 1 D. J. & S. 18, and other cases cited, *post*, pp. 1709, 1710. These are chiefly cases of settlement by deed, but there is no difference between deeds and wills in this respect: *Shuttleworth* v. *Murray*, [1901] 1 Ch. 819.

person who is the eldest son at the date of the will is excluded by name (*n*).

The principle is that the elder shall be deemed a younger child, and the younger shall be deemed an elder in respect of the interests derived under a particular settlement or will (*o*). So that if father and eldest son, tenant for life and in tail, execute a disentailing deed and acquire the fee simple, a younger son cannot afterwards become an elder within the meaning of the rule; for the settlement is destroyed, and though he becomes eldest in fact, it can never give him the estate; and should he afterwards acquire the estate by a new title, as by descent or devise from the elder brother, yet as this will not be under the settlement, it will not exclude him from participating in portions provided by the will or settlement for younger children (*p*). Nor will a younger son who takes by virtue of the exercise of a power of revocation and new appointment, be excluded, if he afterwards becomes an eldest son, for he does not take as eldest son, but by a new title (*q*). But the eldest son, who has concurred with his father in resettling the property, will be excluded, if by the resettlement he takes back substantially what the settlement gave him; as a life-estate with remainder to his issue in tail, instead of the estate tail in himself; or the property burdened with a charge of which he has had the benefit (*r*), or if he joins with his father in raising money by mortgage of the estate, and receives out of it the equivalent in value of a younger child's share (*s*). And the fact that the estate charged proves to be of less value than the portions, or even of no value at all, will not give to the eldest son any right to participate in the portions (*t*).

Only one "eldest son."

Only one person can be excluded as "eldest son" under the rule in question: consequently where the eldest son joined with his father in a resettlement under which he received benefits equal

(*n*) *Wood* v. *Wood*, L. R. 4 Eq. 48. The case was not really within the rule now under consideration, as the gift was by a person not in *loco parentis*.

(*o*) See *per* Wood, V.-C., *Sing* v. *Leslie*, 2 H. & M., at p. 87; *per* Lord Langdale, *Peacocke* v. *Pares*, 2 Kee, at p. 699.

(*p*) *Spencer* v. *Spencer*, 8 Sim. 87; *Macoubrey* v. *Jones*, 2 K. & J. 684 (virtually overruling *Peacocke* v. *Pares*, 2 Kee. 689); *Tennison* v. *Moore*, 13 Ir. R. E. 424; *Re Wrottesley's Settlement*, [1911] 1 Ch. 708; *Ex p. Smyth*, 12 Ir. Ch. R. 487. *A fortiori* where the portions are for "children other than an eldest son entitled under the limitations contained in" the will or settlement; see *Sing* v. *Leslie*, 2 H. & M. 68; *Adams* v. *Beck*, 25 Bea. 648.

(*q*) *Wandesford* v. *Carrick*, 5 Ir. R. Eq. 486.

(*r*) *Collingwood* v. *Stanhope*, L. R. 4 H. L. 43. And see *per* Lord Selborne, *Meyrick* v. *Laws*, L. R. 9 Ch., at p. 242; and *per* Kay, J., *Domvile* v. *Winnington*, 26 Ch. D., at p. 386. *Re Stawell's Trusts*, [1909] 1 Ch. 534, reversed [1909] 2 Ch. 239.

(*s*) *Re Fitzgerald's S. E.*, [1891] 3 Ch. 394. See *Rooke* v. *Plunkett*, [1902] 1 Ir. R. 299.

(*t*) *Reid* v. *Hoare*, 26 Ch. D. 363 (settlement), where an estate charged with £5,000 for portions for children other than an eldest son, was sold for £2,500 before the eldest son came in possession.

in value to a younger child's portion, and died without issue before succeeding to the estate, it was held that his representatives were excluded from sharing in the portions fund, and that the younger son, who succeeded to the estate, was consequently not excluded (*u*).

Rule applies to devise of lands to "younger children."

It was formerly doubted whether the rule applied to a legal devise of lands to younger children (*x*). But in *Re Bayley's Settlement* (*y*), it was applied to a legal limitation of lands by settlement to younger children as tenants in common in tail, on the ground that the same construction must be given to the words by Courts of Law as by Courts of Equity.

Rule does not apply where eldership is not the test.

But it should be observed, that where the portions are to be raised for children generally, the child taking the estate is allowed to participate (*z*).

Shifting clauses.

The rule does not apply to a shifting clause, or an exception in the nature of a shifting clause (*a*). The construction of clauses of this kind is considered elsewhere (*b*).

What parental provisions are not within the rule.

Nor is every gift by a parent a parental provision within the meaning of the rule. The ground of the rule is that an intention is manifested to provide for all the children without permitting any one child to take a double provision at the expense of another (*c*). Generally the same instrument settles the estate and provides the portions; or the instrument providing the portions refers on the face of it to the instrument which settles the estate (*d*). If the will of a parent provides only for younger children and no provision appears to have been made for the eldest, the ground of the rule fails, and "younger children" must, it would seem, be literally construed.

So if a testator settles estate A on his eldest son, estate B on his second son, and estate C on his third son, a shifting clause in favour of a younger son is construed in its ordinary sense (*e*).

(*u*) *Re Fitzgerald's S. E.*, [1891] 3 Ch. 394; *Re Rivers's Settlement Trust*, 40 L. J. Ch. 87. *Rooke* v. *Plunkett*, [1902] 1 Ir. R. 299. Compare *Domvile* v. *Winnington*, 26 Ch. D. 382, *infra*, and *Re Beresford's Settlement*, [1914] 1 Ir. R. 222 (where the second son barred the entail and resettled).

(*x*) By Lord Hardwicke, *Heneage* v. *Hunloke*, 2 Atk., at p. 457.

(*y*) L. R. 9 Eq. 491; 6 Ch. 590. In *Hall* v. *Luckup*, 4 Sim. 5, this construction was aided by the context.

(*z*) *Incledon* v. *Northcote*, 3 Atk., at p. 438.

(*a*) *Per* Lord Westbury, in *Collingwood* v. *Stanhope*, L. R. 4 H. L., at p. 57; *Shuttleworth* v. *Murray*, [1901] 1 Ch. 819; *s.c. s.n. Law Union, etc., Co.* v. *Hill*, [1902] A. C. 263.

(*b*) Chap. XXXVII, *ante*, p. 1411.

(*c*) See *per* Lords Hatherley and Westbury, *Collingwood* v. *Stanhope*, L. R. 4 H. L., at pp. 52, 55, 57.

(*d*) As in *Collingwood* v. *Stanhope*, *supra*; *Re Bayley's Settlement*, L. R. 9 Eq. 491; 6 Ch. 590. Compare *Hervey-Bathurst* v. *Stanley*, 4 Ch. D. 251; 2 A. C. 698 (*Harvey-Bathurst* v. *Errington*), stated *ante*, p. 1414, and *Domvile* v. *Winnington*, 26 Ch. D., at p. 387, where there was no reference to the settlement of the estate.

(*e*) *Wilbraham* v. *Scarisbrick*, 1 H. L. C. 167.

CHAPTER XLII.

The rule will yield to contrary intention indicated by will.

The rule in question is one not of law but of construction and it must give way to the meaning of the will, having regard to the language in which it is expressed (*f*). Thus, in *Re Prytherch* (*g*), a testator gave a portions fund to his "younger children, namely, B, C, D, E, F, G, H, K, and L (the last six being daughters) so that the share or interest of each of them, my said younger children, shall be absolutely vested at his or her age of twenty-one years, whether the preceding trust shall be determined or not." The two eldest sons, A and B, died without issue male. C attained twenty-one years in the lifetime of B, and succeeded to the settled real estate. It was held by North, J., that C was entitled to share in the portions fund.

Only child held to take as youngest child.

It may be observed, that a bequest to "the youngest child of" A has been held to apply to an only child (*h*). An only son has also been held to be excluded by an exception of "the eldest son" from a devise to "second, third, and other sons" (*i*).

Rule confined to parental provisions.

"The rule under consideration," as Mr. Jarman remarks (*k*), "applies only to gifts by parents or persons standing in *loco parentis*, and not to dispositions by strangers, in which the words *younger children* receive their ordinary literal interpretation" (*l*).

Again where there is a gift, by a person not in *loco parentis*, to the children of A, excluding the eldest son, the words of exclusion receive their ordinary interpretation (*m*).

A grandparent does not place himself in *loco parentis* towards his grandchildren merely by making provision for them by will (*n*).

Clear language not controlled by expression of motive.

A mere expression of the testator's reason for excluding the eldest son will not generally make a non-parental provision

(*f*) The construction is not affected by a gift over of a younger son's share of the portions fund in the event of his becoming an eldest son before attaining twenty-one: *Re Bayley's Settlement*, L. R. 6 Ch. 590.

(*g*) 42 Ch. D. 590. Compare *Caldbeck* v. *Caldbeck*, [1911] 1 Ir. R. 144 (where the eldest son who died under twenty-one was held not qualified to receive a portion).

(*h*) *Emery* v. *England*, 3 Ves. 232.

(*i*) *Tuite* v. *Bermingham*, L. R. 7 H. L. 634.

(*k*) First ed., Vol. II, p. 116.

(*l*) See *Lord Teynham* v. *Webb*, 2 Ves. sen. 197; *Hall* v. *Hewer*, Amb. 203; *Lady Lincoln* v. *Pelham*, 10 Ves. 166; *Lyddon* v. *Ellison*, 19 Bea. 565; *Sandeman* v. *Mackenzie*, 1 J. & H., at p. 628; *Shuttleworth* v. *Murray*, [1901] 1 Ch. 819; *s.c. s.n. Law Union* v. *Hill*, [1902] A. C. 263. *Longfield* v. *Bantry*, 15 L. R. Ir. 101, at p. 135. See *contra* Sugd. Pow. 680.

(*m*) *Domvile* v. *Winnington*, 26 Ch. D. 382.

(*n*) *Lyddon* v. *Ellison*, 19 Bea. 565; *Longfield* v. *Bantry*, 15 L. R. Ir. 101.

subject to the rule above considered. Thus, in *Livesey* v. *Livesey* (*o*), a testatrix bequeathed a nominal legacy to "the eldest son of my daughter E. who shall be living at my decease," declaring that she gave him no more because he would have a handsome provision from the estates of his grandfather and father. She then gave a moiety of the residue of her estate to the children of E. "(except her eldest son or such of her sons as shall by the death of an elder brother become an eldest, it being my will that the son who is or shall become an eldest son shall not be entitled to take anything under this devise), equally to be divided among them when the youngest shall attain twenty-one." The eldest son at the decease of the testatrix was provided for as mentioned by her. He died before the second son attained twenty-one; but the latter, although he had thus become the eldest son, did not succeed to the provision made for his elder brother; he therefore contended that he was entitled to a share of the residue, since the declared motive for excluding the eldest was inapplicable to him. But it was held that he was not so entitled, the language of the will being clear and unambiguous.

Exclusion of son entitled to other property.

If a testator devises land to the sons of his nephew R., except an eldest son for the time being entitled in possession to the C estate, this does not exclude the eldest son of R. if, before the testator's death, the C estate has been sold, although the eldest son having been tenant in tail of that estate has a beneficial interest in the proceeds of the sale (*p*).

Meaning of "entitled."

Where the will excludes a son "entitled" to other property, this may mean entitled to the possession, or to a vested remainder (*q*); a contingent interest would *prima facie* not be sufficient (*r*).

As to period of ascertaining who are "younger children."

Mr. Jarman continues (*s*): "Another question, which has been much agitated in construing gifts to younger children, respects the period at which the objects are to be ascertained.

Immediate gifts.

"It is clear that an immediate devise or bequest to younger children applies to those who answer the description at the death of the testator, there being no other period to which the words can be referred (*t*).

(*o*) 13 Sim. 33; 2 H. L. C. 419. See also *Lyddon* v. *Ellison*, 19 Bea. 565. In *Sandeman* v. *Mackenzie*, 1 J. & H. 613, the eldest son was excluded by name.

(*p*) *Law Union* v. *Hill*, *supra*; see *Wyndham* v. *Fane*, 11 Ha. 287 ("entitled in possession by virtue of the limitations hereinafter contained"); *Johnson* v. *Foulds*, L. R. 5 Eq. 268 ("entitled in tail in remainder").

(*q*) *Chorley* v. *Loveband*, 33 Bea. 189; *Re Grylls' Trusts*, L. R. 6 Eq. 589. Compare *Re Maunder*, [1903] 1 Ch. 451, cited *ante*, p. 1286.

(*r*) *Umbers* v. *Jaggard*, L. R. 9 Eq. 200.

(*s*) First ed., Vol. II, p. 117.

(*t*) *Coleman* v. *Seymour*, 1 Ves. sen. 209.

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Gifts by way of remainder.

"It might seem, too, not to admit of doubt upon principle, that where a gift is made to a person for life, and after his decease to the younger children of B, it vests at the death of the testator in those who then sustain this character; subject to be divested *pro tanto* in favour of future objects coming *in esse* during the life of [the tenant for life].

"In the case of *Lady Lincoln* v. *Pelham* (*u*), the bequest was to A for life, and, after her death to her children; and, in case she should have none, or they should all die under twenty-one, then to the *younger children of B*; and A having no child, the younger children of B at the death of the testator, were held entitled to a vested interest. Lord Eldon, however, seems to have thought that this construction was aided by the terms of another bequest; and his Lordship laid some stress on the circumstance that the bequest did not proceed from a parent, or a person standing in *loco parentis*.

Parental provision for younger children.

Appointment to younger children, held subject to implied condition of their not becoming elder.

"In regard to parental provisions of this nature, certainly a peculiarity of construction seems to have obtained, the leading authority for which is *Chadwick* v. *Doleman* (*x*), where a father, having a power to appoint portions among his younger children, to be raised within six months after his death, by deed appointed £2,600, part of the entire sum, to his son T., describing him as his second son. No power of revocation was reserved. T afterwards became an elder son, whereupon the father made a new appointment in favour of another son; and the Lord Keeper held that the second was valid, the first appointment being made upon the tacit or implied condition of the appointee not becoming an elder son before the time of payment.

Objects are ascertained when portions are payable.

"It should seem, then (*y*), that a gift by a father or a person assuming the parental office, in favour of younger children, is, without any aid from the context, to be construed as applying to the persons who shall answer the description at the time when the portions became payable. The object of thus keeping open the vesting during the suspense of payment, probably is to prevent a child from taking a portion as younger child, who has become, in event, an elder child (*z*), and also, perhaps, to

(*u*) 10 Ves. 166.

(*x*) 2 Vern. 528. See also *Loder* v. *Loder*, 2 Ves. sen. 531; *Broadmead* v. *Wood*, 1 B. C. C. 77; *Savage* v. *Carroll*, 1 Ba. & Be. 265; *Macoubrey* v. *Jones*, 2 K. & J., at p. 692; *Jermyn* v. *Fellows*, Ca. t. Talb. 93, a child named in the *power* as an object did not lose his share as younger child, though he afterwards became eldest; but as to this case, see Sug. Pow. 679 (8th ed.).

(*y*) "It is settled that the words 'other than a son for the time being entitled to the estates' mean entitled at the time appointed for raising and distributing the portions": *per* Kay, J., *Reid* v. *Hoare*, 26 Ch. D., at p. 369.

(*z*) "Under this rule, however, a younger child might happen to lose his portion by becoming an elder child, without acquiring the family estate. For instance, suppose lands to be devised to A for life, with remainder to

prevent the inheritance (which is often charged with portions to younger children) from being burdened with the payment of portions which are not eventually wanted."

Thus, suppose lands to be devised to A for life, with remainder to his first and other sons in tail, charged with portions to his younger children to vest at twenty-one, but not to be paid until the death of A. A has several sons, who all attain twenty-one in his lifetime. The eldest then dies in A's lifetime without issue : the second son having thus become the eldest, and as such entitled to the estate, will not take a share of the portions (*a*), but the representatives of the deceased eldest son will (*b*).

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his first and other sons in tail male, charged with portions to his younger children, payable at the decease of A. A has three sons, the eldest of whom dies in the lifetime of A, leaving issue male; the second having, by the decease of his elder brother, become in event the eldest son, would lose his portion as younger son, though the estate had devolved to the issue of his elder brother; probably, however, it would be held, that, under such circumstances, the second son was not such an elder son as the rule contemplated, namely, the elder son *taking the estate*. From some remarks of Sir Thomas Plumer, in the case of *Matthew* v. *Paul*, it is to be inferred, that his Honor did not consider that the construction could be carried to this extent; but in this and some other parts of his judgment the line is not very distinctly drawn between parental provisions and dispositions by a stranger in favour of younger children. It is to the former only that the construction here suggested could, it is conceived, apply." (Note by Mr. Jarman (1st ed.), Vol. II, p. 119). The point does not seem to have been expressly decided, but there is no doubt that the rule is settled in accordance with Mr. Jarman's opinion; see *per* Wood, V.-C., in *Macoubrey* v. *Jones*, 2 K. & J., at p. 698.

(*a*) *Ellison* v. *Thomas*, 1 D. J. & S. 18 (trust for "children other than an eldest son for the time being entitled in possession") : *Swinburne* v. *Swinburne*, 17 W. R. 47 (a similar trust); *Davies* v. *Huguenin*, 1 H. & M. 730 ("children other than an eldest son"); *Re Bayley's Settlement*, L. R. 9 Eq. 491; 6 Ch. 590 ("all sons except eldest"). The decision in *Ellison* v. *Thomas* was treated as correct in *Collingwood* v. *Stanhope*, L. R. 4 H. L. 43, and in *Re Cavendish's Settlement*, 56 Sol. J. 344. See also *Re Smith's Estate*, 27 L. R. Ir. 121; *Rooke* v. *Plunkett*, [1902] 1 Ir. R. 299; *Re Morton's Trusts*, *ib.* 310 n. In *Wood* v. *Wood*, L. R. 4 Eq. 48, where personalty was bequeathed in trust for the testator's son A for life, remainder in strict settlement for "F., the eldest son of A.," and the children of F, and in default of children for F's younger brothers and their children; and a share of residue was given to the children of A "except F" : the case was treated as one of parental provision; but the rule was held not to apply, the exclusion being considered personal and not applicable to a younger brother who by A's death had become eldest.

In *Leake* v. *Leake*, 10 Ves. 477, there was a proviso that if any younger child should be advanced by its parent, such advance should go in satisfaction of its portion; a younger child having been advanced was not compelled to refund on becoming eldest. In *Glyn* v. *Glyn*, 3 Jur. (N.S.) 179; 26 L. J. Ch. 409, a clause excluding an eldest son from a share of *residue* in case he became entitled to the family estate, was held not to operate *after* the time for distributing the residue had arrived. See also *Stares* v. *Penton*, L. R. 4 Eq. 40.

(*b*) *Ellison* v. *Thomas* and *Davies* v. *Huguenin*, *supra*; which appear to overrule *Gray* v. *Earl of Limerick*, 2 De G. & S. 370, at least as a general authority. In *Ellis* v. *Maxwell*, 3 Bea. 587, where the estate was entailed first on A and his issue, and, failing them, on B and her issue, and B had children, but A as yet had none, it was held that B's eldest son had not, while he continued first remainderman, an indefeasible right to a younger child's portion; but it was said by Lord Langdale that if A had a son born, B's eldest son would acquire a younger child's rights.

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It would be otherwise if the eldest son left issue (*c*), or had joined his father in barring the entail so as substantially to enjoy the estate (*d*); for the second son would not in either case have become eldest within the rule, namely, the son taking the estate.

The principle applies where the fund for portions and the settled estate are settled by different persons and instruments (*e*).

Contrary intention.

But the rule of construction will of course yield to a clear expression of intention. Thus, in *Windham* v. *Graham* (*f*), a portions fund was settled on the younger children, to be a vested interest in such of them as attained twenty-one, and there was a clause of accruer, to take effect in the event of a younger son dying or becoming an eldest or only son and entitled in possession to the settled estates, before attaining twenty-one : it was held that the character of younger child was to be ascertained by reference to the time when the portions vested, and not to the time when they became payable. In *Re Bayley's Settlement* (*g*), on the other hand, the limitation was simply to the children other than an eldest or only son, without any declaration as to vesting, but with a clause of accruer somewhat similar to that in *Windham* v. *Graham*. Romilly, M.R., held that the class was to be ascertained at the period of distribution, and that the clause of accruer was not a sufficiently clear expression of intention to exclude the general rule. These two cases were considered in *Re Wise's Settlement* (*h*), where it was held that the character of a younger child was determined when his share vested.

Whether objects of non-parental gift must sustain the character at period of distribution.

After stating the rule of construction applicable to gifts by fathers or persons *in loco parentis* (*i*), Mr. Jarman continues (*k*) : " Shutting out of view these particular cases of parental provision (the propriety of which it is too late to question), and applying to bequests to younger children the principles established by the cases respecting gifts to children in general, it would seem, that, in every case of a future gift to younger

(*c*) See *per* Wood, V.-C., 2 K. & J., at p. 698.

(*d*) *Collingwood* v. *Stanhope*, L. R. 4 H. L. 43, and cases cited *ante*, p. 1704, n. (*r*). See also *Bathurst* v. *Errington*, 2 A. C. 698; 4 Ch. D. 251 (shifting clause).

(*e*) *Collingwood* v. *Stanhope*, L. R. 4 H. L. 43.

(*f*) 1 Russ. 331, referred to *post*, p. 1715. *Re Rivers's Settlement Trust*, 40 L. J. Ch. 87; *Ex p. Smyth*, 12 Ir. R. Ch. 487; *Re Stawell's Trusts*, [1909] 1 Ch. 534, reversed [1909] 2 Ch. 239; *Re Bankes*, 101 L. T. 778, where the younger children were named, and see *Jermyn* v. *Fellows*, Ca. t. Talbot 93.

(*g*) L. R. 9 Eq. 491; 6 Ch. 590.

(*h*) [1913] 1 Ch. 41.

(*i*) *Ante*, p. 1708.

(*k*) First ed., Vol. II, p. 119.

children, whether vested or contingent, provided its contingent quality did not arise from its being limited in terms to the persons who should be younger children at the time of distribution (*l*), or any other period, the gift would take effect in favour of those who sustained the character at the death of the testator, and who subsequently came into existence before the contingency happened, as in the case of gifts to children generally; and, consequently, that a child in whom a share vested at the death of the testator, would not be excluded by his or her becoming an elder before the period of distribution. With this conclusion, however, it is not easy to reconcile the two following cases.

Hall v. *Hewer.*

"Thus, in *Hall* v. *Hewer* (*m*), A having devised lands to trustees, to raise £6,000, afterwards wrote a letter (which was proved as a codicil) to J., one of his trustees, which contained the following passage :—'I have given you and W. a power to mortgage for payment of £6,000, and I beg that that sum may be lent to W., and that you will take such securities from him as he can give, to indemnify you and your children from payment of it; and in case of your death without children, I desire it may be *secured to the younger children of W.*' Lord Hardwicke held that the £6,000 did not vest until the death of J., and then in such persons as were at that time younger children of W.; and, consequently, that a younger child who became an elder during the life of J. was excluded. The grounds of this decision are wholly unexplained, and are not apparent.

Ellison v. *Airey.*

"In *Ellison* v. *Airey* (*n*), £300 was bequeathed to E, to be paid at her age of twenty-one or marriage, and interest in the meantime for her maintenance and education; but if she died before twenty-one or marriage, then to the *younger children of testatrix's nephew F*, equally to be divided to or among them, the eldest son being excluded from any part thereof. Lord Hardwicke was of opinion that it meant such as should be younger children at the death of E before twenty-one or marriage, *the legacy being contingent until that period.*

Remarks on *Hall* v. *Hewer* and *Ellison* v. *Airey.*

"But as the fact of their being younger children at the period of distribution was no part of their qualification, could it properly form a ground for varying the construction? In the case of a devise to A in fee, and if he die under twenty-one, to B, it has long been established that B takes an executory

(*l*) *Livesey* v. *Livesey*, 2 H. L. C. 419.

(*m*) Amb. 203.

(*n*) 1 Ves. sen. 111. "This case has been frequently cited in the present Chapter as an authority for admitting children born before the time of distribution. As such, it is unquestionable, and has always been regarded as a leading case; but this is quite distinct from the point now under consideration." (Note by Mr. Jarman.)

interest, transmissible to his representatives (*o*), and it cannot be material whether the executory devise is in favour of a person *nominatim*, or as the member of a class upon whom the interest has devolved at the death of the testator, or at any subsequent period before the happening of the contingency (*p*).

"It does not appear that either of the preceding cases involved the application of the peculiar rule respecting parental provisions, or that Lord Hardwicke so regarded them (*q*); nor is it even clear that his Lordship considered the construction exclusively applicable to gifts to younger children; for it will be remembered that in the case of *Pyot* v. *Pyot* (*r*) the same eminent Judge laid down the rule generally, that an executory or contingent gift to persons by a certain description, applied to such of them only as answered the description at the happening of the contingency. If there is any such rule, of course the cases under consideration do not exist as a distinct class (*s*). We are too much in the dark as to the ground of decision in *Hall* v. *Hewer*, and *Ellison* v. *Airey*, to found any general conclusion upon those cases, nor, on the other hand, is it safe wholly to disregard them (*t*).

Exception of elder son at the time of distribution.

"It is clear, however, that an express exclusion of the son who shall be elder *at the time of the death of the tenant for life*, will have the effect in like manner of restricting a gift to younger children to such as shall *then* sustain the character (*u*).

Expression an "eldest son" construed to mean elder son at time of distribution.

"And the same construction was given to the expression 'an eldest son,' in *Matthews* v. *Paul* (*x*), which deserves some consideration. A testatrix gave to trustees certain bank stock, upon trust to pay the dividends to her daughter M. for life, and after her decease to P., her husband, for his life, and, after his

Matthews v. *Paul*.

(*o*) *Goodtitle* v. *Wood*, Willes, 211.

(*p*) As to the general distinctions between gifts to classes and individuals, see *ante*, pp. 406 *seq*.

(*q*) In *Hall* v. *Hewer*, Lord Hardwicke expressly noticed that it was the case of a stranger; see *Shuttleworth* v. *Murray*, [1901] 1 Ch., at p. 831.

(*r*) *Ante*, p. 1625.

(*s*) There is no such general rule: *per* Turner, L.J., *Boulton* v. *Beard*, 3 D. M. & G., at p. 612.

(*t*) It seems probable that the former turned, partly at least, on the rule which then prevailed, that a legacy charged on land was in no case to be raised if the legatee died before the time of payment, *ante*, p. 1367. And with regard to the latter, it is worth observing that no child of F was excluded by the construction adopted; for none died before E, E herself dying the day after the testatrix. No child was born in that short interval; but there was one born after the death of E, who claimed a share. The only points decided in the case were that the class (younger children) was not confined to those living at the date of the will, so as to exclude one who was born between that date and the death of the testatrix, but that it did not include the child born after the death of E. R. L., [1747] A. fo. 700 b. [These remarks are taken *verbatim* from the 4th edition of this work by Mr. Vincent, where they form part of the text, Vol. II, p. 208.]

(*u*) *Billingsley* v. *Wills*, 3 Atk. 219.

(*x*) 3 Sw. 328.

decease, upon trust to transfer the said stock unto all the children of M., if more than one (*except an eldest son*), share and share alike, *the same to be vested interests*, and transferable *at their, his, or her, ages or age of twenty-one years*, and in the meantime to invest their respective shares of the dividends for such children's future benefit; and in case any such children or child should die under the said age, leaving any children or child, then the share of every such child to go among their, his or her children; otherwise to go to the survivors or survivor, and to be transferable in like manner as their original share; and in case M. should leave no children or child at her decease, or, leaving such, they should all die under the age of twenty-one years without children as aforesaid, then over. The testatrix then gave certain terminable imperial annuities and other stock to the same trustees, in trust to receive the dividends, and invest the same in government stock, to accumulate until the expiration of the imperial annuities, and thereupon to transfer all such stocks, as well original as accumulated, unto and among all and every the children of her said daughter, if more than one (*except an eldest son*), equally, share and share alike; and if but one, then the whole to such one or only child, the same to be vested interests, and transferable, at such times and in such manner as the bank stock thereinbefore given. One of the younger children became an elder between the periods of the death of the testatrix and the expiration of the imperial annuities, but before any younger child had attained twenty-one, which raised the question as to the point of time to which the exception of an elder son was referable. Sir T. Plumer, M.R., held, first, that the shares vested when one of the younger children attained twenty-one, and not before. With respect to the period at which the phrase 'an eldest son' was to be applied, he considered that three different times might be proposed: the date of the will, the death of the testatrix, and the time when the fund was directed to be distributed. After showing that neither the first nor the second could be intended, he came to the conclusion, that, in all cases of legacies, payable to a class of persons at a future period, the constant rule has been that all persons coming *in esse*, and answering the description at the period of distribution, should take. The same rule must, he thought, be applied to persons excluded. There could not be one time for ascertaining the class of those who are to take, and another to ascertain the character which excludes.

Time of vesting.

"Eldest son," to what period referable.

"But it is to be observed, that though in gifts to children, the time of distribution is the period of ascertaining the number of objects to be admitted, yet it is not necessary to wait until

Observations upon *Matthews* v. *Paul*.

this period in order to see whether children living at the death of the testator, or at any other period to which the vesting is expressly postponed, be objects or not; and it would seem, therefore, upon the principle of his Honor's own reasoning, to be equally unnecessary to wait until the period of distribution, in order to know whether an elder son, in existence at the time of the vesting, would be excluded. In the case of a gift to A for life, and after his death to the children of B, to vest at twenty-one, it may be affirmed of every child who has attained twenty-one in the lifetime of B, that he is an object (*y*); and, by parity of reasoning, it would seem to follow that if any child who would, but for the clause of exclusion, have been an object, comes *in esse*, the exception is ascertained to apply to him (*z*).

Gifts to younger children.

Whether period of vesting is not the time to ascertain who is excluded as an elder child.

"It is singular, that though the M.R. took some pains to show that the legacy did not vest until one at least of the younger children attained twenty-one, and he used the fact as an answer to the argument for applying the description to the death of the testator, yet he never once addresses himself to the inquiry, whether *the period of vesting* was not that to which the term 'eldest son' was to be referred. It is submitted, upon the general principles which govern these cases, and which were applied by Lord Eldon to a bequest to younger children, in *Lady Lincoln* v. *Pelham*, that this *was* the period of ascertaining the individual upon whom the character of eldest son had devolved, whether he was marked out as the sole object of the gift, or for the purpose of being excluded from it. If the gift had been to A for life, and after her decease to an 'eldest son' of A, to be vested and transferable when the younger children or child of A should attain twenty-one, it could not have been doubted for a moment that the person who was eldest son at the period of vesting, whether in the lifetime of A or not, was absolutely entitled; and yet this is precisely the case of *Matthews* v. *Paul*, substituting a gift for the exception. Another remark occurs on this judgment: that though at the outset his Honor treats the case as one in which the provision proceeded from a stranger (being by a grandmother in the lifetime of a parent, without any indication of an intention to stand *in loco parentis*), yet he afterwards cites, in support of his decision, *Chadwick* v. *Doleman* and other cases of provisions by parents.

(*y*) *Ante*, p. 1650.

(*z*) "But if the *youngest* child were excepted, it would obviously be necessary to wait until the period of distribution, in order to know who would be the youngest, the exception embracing the last-born object of the class." (Note by Mr. Jarman.) See the observations on the decision in *Matthews* v. *Paul*, made by Kay, J., in *Domvile* v. *Winnington*, 26 Ch. D., at p. 388, where his Lordship expressed his concurrence with the criticism in the text.

Effect of gift to the elder son for the time being.

"And here it may be remarked, that where there is a gift to the elder son in terms which would carry it to the eldest *for the time being*, and there is another gift in the same will to younger children generally, the latter will receive a similar construction, to prevent the same individual taking under each character (*a*). Such seems at least to be the effect of the case of *Bowles* v. *Bowles*, though in the judgment of Lord Eldon no general position of this nature is distinctly advanced.

"It is clear that if there be an express limitation over in case of a younger son becoming the eldest before a given age or period, this prevents his being excluded by becoming the eldest son under *other* circumstances, by force of the often cited principle (*b*) *exclusio unius est inclusio alterius*. Indeed, Lord Gifford, in the case referred to, was of opinion that a declaration that the children attaining twenty-one, etc., in the lifetime of the parent should take vested interests, was sufficient to entitle a child who was a younger child at this period but subsequently became the eldest. This conclusion, it is conceived, goes far to support the doctrine which has been here contended for, in opposition to *Matthews* v. *Paul;* for as the doubt is not as to the period of vesting, but whether such period is the time of ascertaining the object to be excluded, the declaration in question seems not to be very material. Besides, whatever is its effect, the declaration as to vesting in *Matthews* v. *Paul* seems to be equivalent in principle. The result of Lord Gifford's determination is, that in the case of gifts to younger children, not involving the peculiar doctrine applicable to parental provisions, the time of vesting is the period of ascertaining who are to take under the description of younger children, and who is to be excluded as an elder child.

Exception of an eldest child referred to time of vesting in devise of real estate.

"That this is the rule in regard to devises of real estate appears by the recent case of *Adams* v. *Bush* (*c*), where a testator devised freehold estate to his uncle A for life, remainder to the wife of A for life, remainder to all and every the child and children of A, *other than and except an eldest or only son*, and their heirs, and if there should be no such child *other than an elder or only son*, or being such, all should die under twenty-one, then over. At the death of the testator A had two sons, B and C; B died in A's lifetime, and it was contended that according to the cases respecting gifts to younger children,

(*a*) *Bowles* v. *Bowles*, 10 Ves. 177. See *Sansbury* v. *Read*, 12 Ves. 75, where the younger children were held to be entitled on a very obscure will.

(*b*) *Windham* v. *Graham*, 1 Russ. 331, *ante*, p. 1710. The case was within the rule regarding parental provisions, although this does not appear to have been noticed by Mr. Jarman.

(*c*) (1839), 8 Scott, 405.

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especially *Matthews* v. *Paul*, C was not entitled, as he did not answer the description of younger child when the remainder vested in possession; but the Court certified (it being a case from Chancery) that the devise took effect in favour of C, the second son, he being the younger son *at the death of the testator* (*cc*).

Remarks on *Adams* v. *Bush*.

"This case relieves the point of construction which has been the subject of discussion in the preceding remarks, from the uncertainty which previously existed, so far at least as respects devises of real estate, and it is hoped that the same sound principles will be applied to bequests of personal estate, at least such of them as are not governed by the peculiar doctrine applicable to parental provisions in favour of younger children. There seems to be no solid difference between such bequests and devises of real estate."

Settlement of personalty.

The principle contended for by Mr. Jarman was applied to the construction of a settlement of personalty, in *Re Theed's Settlement* (*d*), where the trusts of a sum of money were for H for life, and if (as happened) he should have no child, then for M for her life, and after her death to pay it to all the children of M *except her eldest or only son*, in equal shares, at twenty-one. The eldest-born son died, and the second attained twenty-one, both in the lifetime of H (who survived M), and it was argued that the second son, being eldest at the period of distribution (H's death), was excluded by the exception; but it was held by Sir W. P. Wood that the interest which vested in him at twenty-one was not divested by his afterwards becoming eldest son.

Exception exhausted on any eldest son being excluded at period of vesting;

And where one child has been excluded as being the eldest son at the period of vesting, the clause of exclusion is exhausted, and the next son, when he attains twenty-one, is not excluded by reason of his becoming, in event, the eldest son (*dd*).

—in bequest of a transmissible contingent interest;

It is true that these cases, and others to the like effect (*e*), do not cover the precise point which appears to have arisen in *Hall* v. *Hewer* and *Ellison* v. *Airey*, *viz.* that of a transmissible contingent interest; but the doubts expressed above, concerning the soundness of those authorities, are strongly confirmed by the decision in *Bryan* v. *Collins* (*f*), where a testatrix bequeathed

(*cc*) Mr. Jarman's statement is not quite accurate. The Court certified that C took, on the death of A, his father, an estate in fee simple in possession defeasible on his dying under twenty-one.

(*d*) 3 K. & J. 375.

(*dd*) *Domvile* v. *Winnington*, 26 Ch. D. 382; *Re Morton's Trusts*, [1902] 1 Ir. R. 310 n.

(*e*) *Adams* v. *Adams*, 25 Bea. 652; *Sandeman* v. *Mackenzie*, 1 J. & H. 613.

(*f*) 16 Bea. 14. See also *Lady Lincoln* v. *Pelham*, 10 Ves. 166, *ante*, p. 1708.

a legacy in trust for the eldest daughter of M. D., to be paid when she attained her majority, and if there should be no such daughter, then to the *eldest daughter of* G. B., payable in like manner; G. B. had a daughter A, who was born soon after the death of the testatrix, but died in 1827, and another daughter B, who was still living; and M. D. having died unmarried in 1851, the second daughter claimed to be the eldest within the meaning of the will, but Romilly, M.R., decided that the legacy vested in A at her birth, liable only to be divested on the birth of a daughter to M. D.

—not where context shows contrary intention.

The context, however, may show an intention that the class to be included, or the individual to be excluded, shall be determined at the time of distribution, and not at the time of vesting. Thus, where the gift was to A for life, with remainder to the two eldest children of B, C and D respectively, the two eldest living at the death of A were held to be entitled by reason of a gift over in case there should be only one child *then* living (*g*).

VII.—Gifts to "eldest," "first," or "second" Son.—As in a gift to younger children, or in an exception of the eldest son, so also in a gift to the eldest or to the first or second son of A, the reference is *prima facie* to the order of birth (*h*). But of course this construction is excluded if at the date of the will the first (or second) born son is to the testator's knowledge dead (*i*), or if he speaks of a son who is not first-born "becoming eldest" (*j*), or of the eldest at a given period (*k*), or for the time being (*kk*).

Where only one son or child.

The term "eldest" or "youngest" may apply to an only son or only child (*l*).

"First" son living at date of will takes as *persona designata*.

In the case of a gift to the "eldest son" of A, if at the date of the will a son is living who answers the description, he takes as *persona designata* (*m*); so that if he dies before the testator the gift lapses (*n*); unless it is within the protection given by

(*g*) *Madden* v. *Ikin*, 2 Dr. & Sm. 207. See also *Stevens* v. *Pyle*, 30 Bea. 284; *Harvey* v. *Towell*, 7 Hare, 231, better rep. 12 Jur. 241; *Livesey* v. *Livesey*, 13 Sim. 33; 2 H. L. C. 419; and see *Cooper* v. *Macdonald*, L. R. 16 Eq., at p. 272.

(*h*) *Trafford* v. *Ashton*, 2 Vern. 660; *Bennett* v. *Bennett*, 2 Dr. & Sm. 266; *Meredith* v. *Treffry*, 12 Ch. D. 170.

(*i*) *King* v. *Bennett*, 4 M. & Wel. 36.

(*j*) *Bathurst* v. *Errington*, 2 A. C. pp. 698, 709 (shifting clause).

(*k*) *Livesey* v. *Livesey*, 13 Sim. 33; 2 H. L. C. 419.

(*kk*) *Bowles* v. *Bowles*, 10 Ves. 177.

(*l*) *Emery* v. *England*, 3 Ves. 232; *Tuite* v. *Bermingham*, L. R. 7 H. L. 634.

(*m*) *Meredith* v. *Treffry*, 12 Ch. D. 170; *Saunders* v. *Richardson*, 18 Jur. 714 (settlement).

(*n*) *Amyot* v. *Dwarris*, [1904] A. C. 268, disapproving *Re Harris's Trust*, 2 W. R. 689.

the Wills Act, ss. 32, 33 (*o*); or unless the testator has, in the event, disposed of the subject otherwise, as in *Thompson* v. *Thompson* (*p*), where a testator gave a share in his property to the eldest son of his sister A, and another share to the eldest son of his sister B, and it appeared that each sister had living at the date of the will an eldest son, and other children, but that the eldest son of A died before the date of a codicil whereby the testator (who knew of A's death) bequeathed a legacy to all the children then living of A and B, except the two provided for in the will. Sir J. K. Bruce, V.-C., without saying what he might have thought right, had the codicil not existed, held that the eldest son of A who survived the testator became entitled under the bequest.

Devise to "second son" where none at date of will or testator's death, held to mean second-born.

If the gift be to the "first," or the "second," son, and there is no son who answers the description living at the date of the will, or at the time of the testator's death, the first who afterwards comes *in esse* and answers the description is entitled. Thus, in *Trafford* v. *Ashton* (*q*), where a testator, about the time of his daughter's marriage, devised his estate in trust for her for life, remainder to the second son of her body in tail male, and so to every younger son; and added, that he did not devise the estate to the eldest son, because he expected his daughter would marry so prudently that the eldest son would be provided for; Lord Cowper said the *second* son was the second in order of birth, and held such son to be entitled, though not born until after the death of the first.

Son who comes *in esse* after the will and dies before the testator, not reckoned.

But a son who comes into existence after the date of the will, and dies before the testator, is not reckoned. Thus, in *Lomax* v. *Holmden* (*r*), a testator devised land to the first son of C in tail, remainder to his second and other sons (without words of limitation), and in default of such issue, over. At the date of the will C had no son, but afterwards had one who died before the testator, and then another A, who was the eldest son living at the testator's death. Lord Hardwicke decided that A took the estate; because "the making and the death only, not the intermediate time, were to be regarded in construing wills," and the idea that the testator meant a first son in being at the date of his will was excluded by the fact that there was then no son of C.

(*o*) *Per* Hall, V.-C., *Meredith* v. *Treffry*, *supra*, n. (*m*). But as to implying an estate tail from the gift over "in default of issue male" (as was there suggested), *vide post*, Chap. LII.

(*p*) 1 Coll., at p. 388. See *Perkins* v. *Micklethwaite*, 1 P. W. 274, *ante*, p. 189, n. (*y*); cf. *ib.* p. 397.

(*q*) 2 Vern. 660. See also *Alexander* v. *Alexander*, 16 C. B. 59; *Bennett* v. *Bennett*, 2 Dr. & Sm. 266; *Driver* v. *Frank*, 3 M. & Sel. 25; *Sheridan* v. *O'Reilly*, [1900] 1 Ir. R. 386.

(*r*) 1 Ves. sen. 290.

So, in *King* v. *Bennett* (*s*), where, after successive life estates to A and her husband B, the testator devised lands to their second son in fee, and it appeared that of three sons which A and B had had, the third alone survived at the date of the will; that they afterwards had a fourth son, who died in the testator's lifetime; and subsequently a fifth, who survived him; it was held, upon the principle of the last case, that the fifth son, being second at the date of the testator's death, took under the devise. It was thought clear that the testator did not mean the second in order of birth, because at the date of the will that son had died.

Bequest to "seventh or youngest child"; seventh surviving, but eighth born, held not entitled.

In *West* v. *Primate of Ireland* (*t*), Sir Septimus R. desired that his executor would, at his (the executor's) decease, bequeath 1,000 guineas to Lord C. "for the use of his seventh, or youngest child *in case he should not have a seventh child living*." At the date of the will Lord C. had six children living, and had had a seventh who had died, but it did not appear that the testator knew of this; at the death of the executor, he had ten. The executor bequeathed the money in the words of the original will, and Lord Thurlow held that the seventh child living at the executor's death, being in fact the eighth born, could not take by the description of seventh child, and decreed in favour of the youngest child then living (*u*).

"Becoming eldest son of A."

Where a shifting clause is to take effect in the event of a younger son of A becoming his "eldest son," this only applies to a son who becomes the eldest son during A's lifetime (*x*).

"Next surviving son."

Where a testator devises estate A to his eldest son by name, estate B to his second son by name, and so on, with a gift over, in the event of any son dying without issue, to his "next surviving son according to seniority of age and priority of birth," this means "next younger," the testator having himself arranged the sons according to their order of birth (*y*).

"Next eldest."

"Next eldest brother," as applied to one of the testator's sons, may mean next younger (*z*).

(*s*) 4 M. & Wel. 36.

(*t*) 2 Cox, 258; 3 B. C. C. 148.

(*u*) Mr. Jarman, who cites the case (Vol. II, p. 110) somewhat less fully than in the text, adds this note: "But did not the language of the bequest import that the youngest was only to become entitled in case there was no *seventh* child at the time of ascertaining the object?"

(*x*) *Bathurst* v. *Errington*, 2 A. C. 698. See *ante*, p. 1414.

(*y*) *Eastwood* v. *Lockwood*, L. R. 3 Eq. 487. Compare the cases in the next section, especially *Re Blake*, and *Locke* v. *Dunlop*, in each of which the words "seniority of age and priority of birth" also occurred.

(*z*) *Crofts* v. *Beamish*, [1905] 2 Ir. R. 349. The process by which the C. A. arrived at this result is described with delectable humour by Mr. Theobald in the preface to the seventh edition of his book on Wills. See *Wills* v. *Wills*, [1909] 1 Ir. R. 274.

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Children "from S. downwards."

In *Lett* v. *Osborne* (*a*), the gift was to the family of A. "from S. downwards": S. was the second child of A.: it was held that S. was entitled to share.

First and other sons.

It may be observed that a devise of land to the first and other sons of A for life or in tail, implies succession (*b*).

VIII.—Gifts to "other" Children or Sons.—As a general rule, the word "other" or "others" is construed in its ordinary signification. Thus, if there is a gift to each of the testator's sons and daughters, A, B, C, D, and E for life, and after the death of each to his or her children, with a gift over in default of children to "the others" of the sons and daughters, this *prima facie* means the individuals other than the deceased legatee, and not the survivors who are living at his or her death (*c*). If the gift over is to "the others or other, and if more than one in equal shares," the question arises whether these words show that the testator contemplated a diminution in the number of persons to take under the gift over. In *Re Hagen's Trusts* (*d*), Hall, V.-C., held that the words made no difference, and that on the death of C without leaving children the representatives of A and B (who predeceased C) were entitled to share. On the other hand, in *Re Chaston* (*e*), Fry, J., held that on the death of any of the original legatees without leaving issue the class to take consisted of all the others except those who had died without leaving issue.

Langston v. *Langston.*

Mr. Jarman concludes the present chapter with a statement of the case of *Langston* v. *Langston* (*f*), which, as he remarks (*g*), "is remarkable for the great difference of opinion that existed in regard to the true construction of the will. The question was, whether the first son of the testator's son A was excluded, under a clause which directed trustees to convey to him (A) for life, with remainder to trustees to preserve, with remainder to the *second*, third, fourth, fifth, and all and every *other* son and sons of A successively, as they should be in seniority of age and priority of birth, in tail male, with remainder to the testator's second and other sons successively in tail male, with numerous remainders over. The eldest son of A claimed an estate tail male expectant on the decease of A. The Court of King's Bench, on a case from Chancery, certified that he took no estate. Sir

Devise to first son supplied by implication from the entire will.

(*a*) 47 L. T. 40.
(*b*) *Post*, p. 1761.
(*c*) *Re Hagen's Trusts*, 46 L. J. Ch. 665; *per* Fry, J., in *Re Chaston*, 18 Ch. D. at p. 223.
(*d*) *Supra.*
(*e*) 18 Ch. D. 218. The gift over was on the death of a legatee without leaving issue.
(*f*) 8 Bligh. (N.S.) 167.
(*g*) First ed., Vol. II, p. 127.

J. Leach, M.R. (being, as it should seem, dissatisfied with this opinion), sent a case to the Judges of Common Pleas, who certified that the first son of A took an estate tail male, and the M.R. decreed accordingly, at the same time recommending that the case should be carried to the House of Lords, which was done; and that House, after much consideration, affirmed the decree of the Court below."

Intention to exclude eldest son.

It may, perhaps, be doubted whether the decision lays down any general principle. At all events it is clear that if the general scheme of the will shows an intention to exclude the eldest son, he will not be included under a general limitation to "other sons." Thus, in *Locke* v. *Dunlop* (*h*), the testator devised real estate to his second son F. in strict settlement, with remainder to his third son G. in like manner, with remainder to "my fourth, fifth, and all and every other son . . . to be begotten," in tail male, with remainder to his daughters; all the sons except the eldest died without issue male: it was held that he could not take under the expression "every other son" (*i*).

Whether eldest son can take as "other child."

In *Tavernor* v. *Grindley* (*k*), the will contained provisions which showed as clearly as those in *Locke* v. *Dunlop* that the testator intended to exclude his eldest son, but it was held that he was entitled to share under the expression "other child."

Express exception of eldest son.

If the limitation to "other sons" contains an express exception of the eldest son, he cannot take, even if he is the only son (*l*).

IX.—Gifts to Parent and Children.—As a general rule a gift to A and his children is construed as a gift to them concurrently (*m*). But in certain cases (especially where the gift is to a wife and children) more or less slight indications of a contrary intention are allowed to prevail, with the result that the parent takes only a life interest (*n*).

Where there is a gift to X for life, and after his death to one or more persons and their children then living, the requirement of being then living, does not, as a general rule, apply to the parents (*o*).

The rule in *Wild's Case* forms the subject of Chap. L.

(*h*) 39 Ch. D. 387.

(*i*) The case of *Re Blake*, 19 W. R. 765, was a very special one; it is commented on in *Locke* v. *Dunlop*; *Grattan* v. *Langdale*, 11 L. R Ir. 473, was not cited in *Locke* v. *Dunlop*. See also *Eastwood* v. *Lockwood*, L. R. 3 Eq. 487, and *Lett* v. *Osborne*, 47 L. T. 40, *ante*, p. 1720.

(*k*) 32 L. T. 424.

(*l*) *Tuite* v. *Bermingham*, L. R. 7 H. L. 634.

(*m*) *Newill* v. *Newill*, L. R. 7 Ch. 253; *Re Astbury*, [1926] W. N. 336; *Re Jones*, [1910] 1 Ch. 167, and other cases cited *post*, p. 1875.

(*n*) These cases are referred to *post*, p. 1873.

(*o*) *Cormack* v. *Copous*, 17 Bea. 397, citing *Burrell* v. *Baskerfield*, 11 Bea. 525, and *Turner* v. *Hudson*, 10 Bea. 222, where only parents who survived the tenant for life were included in the class.

CHAPTER XLIII.

DEVISES AND BEQUESTS TO ILLEGITIMATE CHILDREN AND OTHER RELATIONS.

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Effect of domicil.

I.—How Legitimacy is determined.—In cases of gifts by will to the children of a person, the question of legitimacy is, as a general rule, determined by the law of the parents' domicil (*a*), whether the subject of the gift is personalty (*b*), or realty (*c*), or land devised upon trust for sale (*d*).

Consequently, if two persons of the Jewish faith, domiciled in England, contract a marriage which is void by the law of England, although valid by the Jewish law (so-called), their children are illegitimate (*e*).

And although the English Courts do not, as a general rule, question the validity of a marriage celebrated abroad, which is valid according to the law of the parties' domicil, they do not recognise a marriage which is contrary to the doctrines universally accepted by Christian countries, such as a polygamous or incestuous union (*f*).

(*a*) The same rule applies in the case of intestacy, so far as the devolution of personal property is concerned. But in the case of real estate situate in England, in the event of its devolution under an intestacy, the question of legitimacy is determined by English law: *Doe* d. *Burtwhistle* v. *Vardill*, 6 Bing. (N.C.) 385; *S. C. sub nom. Birtwhistle* v. *Vardill*, 7 Cl. & F. 895.

(*b*) *Re Andros*, 24 Ch. D. 637.

(*c*) *Re Grey's Trusts*, [1892] 3 Ch. 88. In *Atkinson* v. *Anderson*, 21 Ch. D. 100, the children were illegitimate according to the law of the domicil, but they took under a devise to them *nominatim*.

(*d*) *Skottowe* v. *Young*, L. R. 11 Eq. 474.

(*e*) *Re De Wilton*, [1900] 2 Ch. 481.

(*f*) *Hyde* v. *Hyde*, L. R. 1 P. & D. 130; *Brook* v. *Brook*, 9 H. L. C. 193; *Sottomayor* v. *De Barros*, 3 P. D. 1; 5 P. D. 94; *Re Bozzelli's Settlement*, [1902] 1 Ch. 751.

Where a foreigner or person domiciled abroad enters into a marriage with a British subject or a person domiciled in England, difficult questions as to its validity may arise (*g*).

Foreign divorce.

If two persons, domiciled in England, are lawfully married according to English law, and are afterwards divorced by the decree of a foreign tribunal, the divorce will not be recognised by the English Courts, unless the parties were, at the time of the decree, *bona fide* domiciled according to English law in the country where it was pronounced. Consequently if, after the so-called divorce, either of the parties goes through the form of marriage with another person, no child of that union will be recognised as legitimate by the English Courts (*h*).

Jewish law.

It followed that if a Jew was domiciled in England, his illegitimate children could not formerly be legitimised by his marrying their mother, although the doctrine of *legitimatio per subsequens matrimonium* is part of the Jewish law (*i*).

Child illegitimate though born in wedlock.

The child of a married woman, born during the lifetime of her husband, is *prima facie* legitimate, but if non-access for the necessary period is proved, the child is illegitimate (*j*). But neither a husband nor a wife is permitted to give evidence of non-intercourse after marriage to bastardise a child born in wedlock (*k*).

Marriage by repute.

Strict evidence of the solemnisation of a marriage is not always required : reputation of marriage may be sufficient (*l*).

Children *en ventre* treated as illegitimate.

A child born in lawful wedlock is *prima facie* legitimate, although born at such a time that it must have been begotten before its mother was married, but it may nevertheless not be entitled to share in a gift to its mother's children, if it was *en ventre sa mère* at the time when the class of children was ascertained, and she was not then married (*m*).

The Legitimacy Act, 1926.

The Legitimacy Act, 1926, provides for the legitimation in England and Wales of an illegitimate person by the subsequent marriage of the parents. The legitimation is conditional upon (1) the illegitimate person being alive at the date of the subsequent marriage (section 1, sub-section (1)); (2) the domicile of the father at the date of the subsequent marriage being either in England or Wales or in a country other than England or

(*g*) *Ogden* v. *Ogden*, [1907] P. 107; *Chetti* v. *Chetti*, [1909] P. 67.

(*h*) *Shaw* v. *Gould*, L. R. 3 H. L. 55, affirming Kindersley, V.-C., in *Re Wilson's Trusts*, L. R. 1 Eq. 247; *Re Stirling*, [1908] 2 Ch. 344.

(*i*) *Levy* v. *Solomon*, 25 W. R. 842; but see now the Legitimacy Act, 1926, *post*.

(*j*) *Hawes* v. *Draeger*, 23 Ch. D. 173. The presumption of legitimacy may be rebutted in other ways : *Morris* v. *Davies*, 5 Cl. & F. 163.

(*k*) *Russell* v. *Russell*, [1924] A. C. 687.

(*l*) *Lyle* v. *Ellwood*, L. R. 19 Eq. 98; *Re Green*, 25 T. L. R. 222; *Re Haynes*, 94 L. T. 431.

(*m*) *Re Corlass*, 1 Ch. D. 460. Stated *ante*, p. 1680.

Wales by the law of which (*n*) (at such date) the illegitimate person became legitimated by virtue of such subsequent marriage (section 1, sub-section 1, section 8, sub-section 1); and (3) the father or the mother of the illegitimate person not having been married to a third person when the illegitimate person was born (section 1, sub-section 2). The Act is retrospective, so that in the case of an illegitimate person whose parents' subsequent marriage took place before the commencement of the Act, that person, if living, is legitimated from that commencement, January 1, 1927 (section 1, sub-section 1). Where the marriage took place after the commencement of the Act the legitimation dates from the date of the marriage (section 1, sub-section 1).

Act retrospective.

A legitimated person, *i.e.*, a person legitimated under the Act (section 11), his spouse, children or more remote issue are entitled to take any interest—(a) in the estate of an intestate dying after the date of legitimation (*nn*), (b) under any disposition coming into operation after the date of legitimation, (c) by descent under an entailed interest created after the date of legitimation, in like manner as if the legitimated person had been born legitimate (section 3, sub-section 1).

As between legitimate and legitimated children, where the right to any property, real or personal, depends on the relative seniority of the children, the legitimated children are to rank as if they had been born on the day when they became legitimated, and where more than one such legitimated child became legitimated at the same time, such persons are to rank as between themselves in the order of seniority (section 3, sub-section 2).

Legitimation under the Act does not affect the succession to any dignity or title of honour or render any person capable of succeeding to or transmitting a right to succeed to any such dignity or title (section 10, sub-section 1), and property (real or personal) or any interest therein which is limited to devolve along with a dignity or title of honour is so to devolve as if the Act has not been passed (section 3, sub-section 3). The provisions of section 3, above stated, are, however, applicable only if and so far as a contrary intention is not expressed in the disposition, and have effect subject to the terms of the disposition and the provisions therein contained. Upon the death intestate of a legitimated person or a child or remoter issue

(*n*) Previous to 1927 the English Courts did not recognise the legitimacy of children born illegitimate but legitimised, as in many foreign countries (including Scotland), by the subsequent marriage of their parents unless the father was domiciled in a country where this law prevailed both at the date of the birth of the child and at the date of the marriage: *Re Wright's Trust*, 2 K. & J. 595; *Re Goodman's Trusts*, 17 Ch. D. 266; *Re Grove*, 40 Ch. D. 216. *Re Goodman's Trusts* and *Re Andros*, 24 Ch. D. 837, both disapproved *Boyes* v. *Bedale*, 1 H. & M. 798.

(*nn*) *Re Lowe*, [1929] 2 Ch. 210.

of a legitimated person the same rules of succession to his real and personal property are to apply as would have applied if he had been born legitimate (section 4). The above provisions with regard to the taking of interests in property by or in succession to the spouse, children and remoter issue of a legitimated person are made applicable to the case of an illegitimate person dying after January 1, 1927, and before the marriage of his parents but leaving a spouse, children, or remoter issue living at the date of such marriage, if the deceased illegitimate person, had he been alive at the date of the marriage, would, at such date, have become legitimate (section 5). Subject to the provisions of the Act, the provisions of any Act relating to allowances, benefits or otherwise by or in respect of a legitimate child are to apply to a legitimated person (section 6, sub-section 1).

Where a legitimated person or any relative of a legitimated person takes any interest in real or personal property, the death duties leviable after the date of legitimation are payable at the same rate as if the legitimated person had been born legitimate (section 7).

Existing illegitimate children capable of taking.

II.—Illegitimate Children in Existence when the Will is made capable of taking. What is a Sufficient Description of them.—Mr. Jarman states the general rule thus (*o*): "Illegitimate children, born at the time of the making of the will, may be objects of a devise or bequest, by any description which will identify them (*p*). Hence, in the case of a gift to the natural children of a man or of a woman, or of one by the other, it is simply necessary to prove that the objects in question had, at the date of the will, acquired the reputation of being such children. It is not *the fact* (for that the law will not inquire into), *but the reputation of the fact*, which entitles them. The only point, therefore, which can now be raised in relation to such gifts is, whether, according to the true construction of the will, it is clear that illegitimate children were the intended objects of the testator's bounty; for, let it be remembered, that though illegitimate children *in esse* may take, under any disposition by deed or will adequately describing them, yet it has long been an established rule, that a gift to children, sons, daughters, or issue, imports *prima facie legitimate* children or issue (*q*), excluding those who are illegitimate, agreeably to

Gifts to children, *prima facie*, mean legitimate children.

(*o*) First ed., Vol. II. p. 129.

(*p*) *Metham* v. *Duke of Devon*, 1 P. W. 529.

(*q*) "The rule cannot be stated too broadly, that the description 'child, son, issue,' every word of that species, must be taken *prima facie* to mean legitimate child, son, or issue": *per* Lord Eldon in *Wilkinson* v. *Adam*, 1 V. & B., at p. 462.

the rule, '*Qui ex damnato coitu nascuntur, inter liberos non computentur*' (*r*). Nor will expressions, or a mode of disposition affording mere conjecture of intention, be a ground for their admission.

Not extended to illegitimate children upon mere conjecture.

"This is well illustrated by the case of *Cartwright* v. *Vawdry* (*s*), where A having *four* children, *three legitimate and one illegitimate* (the latter being an ante-nuptial child of himself and his wife), bequeathed to *all and every such child or children*, as he might happen to leave at his death, for maintenance until twenty-one or marriage, and then in trust to pay *such child or children one-fourth* part of the income of his estates; but in case there should be only one such child who should attain that age or marriage as aforesaid, then to pay the whole income to such only child, if the others should have died without issue: and there was a limitation to survivors in case of the death of any of the children under age, unmarried, and without issue. It was contended that the distribution into fourths plainly indicated, that the illegitimate daughter was in the testator's contemplation, *there being four children including her* when the will was made, and that all the expressions applied to females, showing that he meant existing daughters, not future issue, which might be male or female. But Lord Loughborough decided against the illegitimate daughter. He said it was impossible that an illegitimate child could take equally with lawful children in a devise to children (*t*). This decision has been commended by Lord Eldon, who, in a subsequent case, addressing himself to the argument urged on behalf of the illegitimate daughter (*u*), observed, 'that the direction to apply the income in fourths only afforded conjecture; as if between the time of his will and his death one or two of these children had died, the division into fourths would have been just as inapplicable as it was in the case that happened. The question, therefore, only comes to this, whether the single circumstance of his directing the maintenance in fourths compelled the Court to hold, by necessary implication (*x*), that the illegitimate child was to take by implication with the others, as much as if she had been in the plainest and

Lord Eldon's observations upon *Cartwright* v. *Vawdry*.

(*r*) *Hart* v. *Durand*, 3 Anst. 684, *post*, p. 1733. See also *Cartwright* v. *Vawdry*, 5 Ves. 530. *Harris* v. *Stewart*, cit. 1 V. & B. 434; *Re Cooper*, 2 T. L. R. 10. A surrender of copyholds to the use of a will was never supplied in equity in favour of illegitimate children: *Fursaker* v. *Robinson*, Pre. Cha. 475; *Tudor* v. *Anson*, 2 Ves. sen. 582.

(*s*) 5 Ves. 530. *Re Wells' Estate*, L. R. 6 Eq. 599, was a similar case.

(*t*) This is not accurately stated, as a general proposition: since Mr. Jarman wrote it has been clearly established that illegitimate and legitimate children can take concurrently under a gift to "children," *post*, p. 1735.

(*u*) See judgment in *Wilkinson* v. *Adam*, 1 V. & B., at p. 464, which is replete with learning on this subject.

(*x*) As to "necessary implication," see *post*, p. 1729.

clearest terms *persona designata; and my opinion is that this circumstance is by no means sufficient.* The will would have operated in favour of all his children, however numerous they might have been, and in favour of subsequent legitimate children even if every legitimate child he had before had died. *It was therefore impossible to say he necessarily means the illegitimate child; as it is not possible to say he meant those legitimate children.* That will would have provided for children living at the time of his death, though not at the date of his will. It could not be taken to describe two classes of children, both legitimate and illegitimate. Without extrinsic evidence, it was impossible to raise the question. The will itself furnished no question whether legitimate or illegitimate children were intended; the question upon which the Court was to decide was furnished by matter arising out of, not in the will.'

"These observations afford a more satisfactory explanation of the grounds of Lord Loughborough's decision, than is to be found in his Lordship's own judgment. It will be useful to keep in view the circumstances of the case, and Lord Eldon's comment upon them, when we proceed to examine some later adjudications noticed in the sequel.

Illegitimate children not let in merely from absence of other objects.

"And it is clear that the fact of there being no other than illegitimate children when the will takes effect, or at any other period, so that the gift, if confined to legitimate children, has eventually failed for want of objects, does not warrant the application of the word 'children' to the former objects.

Godfrey v. *Davis.*

"Thus, in *Godfrey* v. *Davis* (*y*), where a testator, after giving certain annuities, desired that the first annuity that dropped in might devolve upon the '*eldest child*, male or female, for life, of W.' At the time the will was made W had several illegitimate children, who were known to the testator, but no others; and he had no legitimate child then, or when the first annuitant died. Sir W. Grant M.R. (*z*), held, that there was not sufficient to entitle any of the illegitimate children; for, whatever the real intention of the testator might be, and though it could hardly be supposed he had not some children then existing in his contemplation, yet as the words were 'the eldest *child,' such persons only could be intended as could entitle themselves as children by the strict rule of law;* and no illegitimate child could claim under such a description, unless particularly pointed out by the testator, and manifestly and incontrovertibly intended, though in point of law not standing in that character."

(*y*) 6 Ves. 43, *ante*, p. 1668.
(*z*) The M.R. was Sir R. P. Arden.

The cases of *Kenebel* v. *Scrafton* (*a*), *Harris* v. *Lloyd* (*b*), *Warner* v. *Warner* (*c*); *Mortimer* v. *West* (*d*), and *Arnold* v. *Preston* (*e*), illustrate the same principle.

Principle of the cases.

"In all the preceding cases," as Mr. Jarman points out (*f*), "legitimate children were, or might have been entitled under the bequest; and this possibility (according to the principles of construction already laid down) was fatal to the claim of illegitimate children. In none of the wills was there such a manifestation of an intention to use the word *children* in any other than its ordinary legal signification (namely, legitimate offspring), as could form the ground of a judicial determination."

Express reference to illegitimacy.

The simplest case of a gift taking effect in favour of illegitimate children is where they are expressly described or referred to as illegitimate, either by name, or as a class. In the latter case, illegitimate children living at the date of the will take (*g*): whether the gift also includes after-born children is a question discussed later.

So a gift to the natural children of A, a man, by a particular woman, or of B, a woman, by a particular man, may be good as to existing children, for in all these cases the question, as already mentioned (*h*), is one of reputation (*i*).

A testator may also show that he refers to illegitimate children by expressing doubts as to their legitimacy, or to the validity of their parents' marriage (*k*).

Illegitimate children referred to by number.

If a testator makes a bequest to "the three children of A born prior to her marriage with her present husband," and it turns out that there are in fact four such children, and that as regards three of them their existence was known to the testator, the fourth child will not be included in the gift unless the testator is proved to have been aware of its existence at the date of the will (*l*).

(*a*) 2 East, 530.

(*b*) T. & R. 310.

(*c*) 15 Jur. 141, *post*, p. 1730.

(*d*) 3 Russ. 370.

(*e*) 18 Ves. 288. See also *Osmond* v. *Tindall*, 5 Ves. 534, c, n.; *Durrant* v. *Friend*, 5 De G. & S. 343; *Re Davenport's Trust*, 1 Sm. & Gif. 126; *Re Overhill's Trust*, *ib.* 362; *Kelly* v. *Hammond*, 26 Bea. 36; the cases of *Dorin* v. *Dorin*, L. R. 7 H. L. 568, and *Re Brown*, 63 L. T. 159, are both referred to *post*, p. 1739.

(*f*) First ed., Vol. II, p. 134. As to the case of *Bagley* v. *Mollard*, 1 R. & My. 581, also cited by Mr. Jarman, see *post*, p. 1734.

(*g*) *Bentley* v. *Blizard*, 4 Jur. (N.S.) 652; *Barnett* v. *Tugwell*, 31 Bea. 232.

(*h*) *Ante*, p. 1725.

(*i*) *Metham* v. *Duke of Devon*, 1 P. W. 529.

(*k*) *Snelham* v. *Bayley*, 5 Ves. 534, n.; 1 S. & St. 78; *Howarth* v. *Mills*, L. R. 2 Eq. 389. *Re Brown's Trust*, L. R. 16 Eq. 239.

(*l*) *Re Mayo*, [1901] 1 Ch. 404. As to the effect of a similar mistake in the case of legitimate children, see *ante*, pp. 1682 *seq.*

Identified by name.

Illegitimate children may, of course, be identified by name, as in the case of a legacy to "my son John," or "my granddaughter Mary," the testator leaving no child or grandchild of those names except such as are illegitimate (*m*). But if he has two grandchildren both named A B, one legitimate and the other illegitimate, and bequeaths a legacy to "my grandchild A B," the legitimate grandchild will take (*n*), unless the language of the will shows that the testator used "grandchild" as including illegitimate grandchildren, in which case extrinsic evidence would be admissible to show which grandchild he meant (*o*).

And if a testator refers to his illegitimate children by name as his children, and afterwards makes a gift in favour of "my children," having no legitimate children, the "illegitimate children will take" (*p*).

So where the gift is to the children of a woman (*q*).

Implication in favour of illegitimate children.

An intention to benefit existing illegitimate children may be shown in various ways, without naming them, and without expressly referring to their illegitimacy, or doubtful legitimacy.

In some of the earlier cases (*r*), it was laid down by Lord Eldon and other Judges that such an intention must appear by necessary implication upon the will itself, but this is far too strong a way of putting the rule. In the first place, as pointed out by Mr. Jarman (*s*), the doctrine so stated "is not to be understood as precluding all inquiry into the state of the testator's family. Thus, in the case of a devise to 'my children now living' (*t*), or 'to the children of A' a *deceased person* (*u*), it is not known by a mere perusal of the will whether legitimate or illegitimate children were intended; and yet when it is ascertained that there were no other than the latter objects in existence, the conclusion that he meant illegitimate children, is irresistible." And with regard to the meaning of the expression "necessary implication," Lord Eldon himself explained it as meaning "not natural necessity, but so strong a probability of intention, that an intention contrary to that which is imputed to the testator, cannot be supposed" (*x*). In fact, "necessary implication," at the present day, would appear to mean little

Necessary implication.

(*m*) *Rivers's Case*, 1 Atk. 410.
(*n*) *Re Fish*, [1894] 2 Ch. 83.
(*o*) See Chap. XV, *ante*, p. 445.
(*p*) *Hartley* v. *Tribber*, 16 Bea. 510.
(*q*) *Re Connor*, 2 J. & L. 456.
(*r*) *Wilkinson* v. *Adam*, 1 V. & B. 422, and the cases cited *ante*, p. 1726.
(*s*) First ed., Vol. II, p. 139.
(*t*) *Blundell* v. *Dunn*, *post*, p. 1731.
(*u*) *Lord Woodhouselee* v. *Dalrymple*, *post*, p. 1731.
(*x*) 1 V. & B. p. 465.

more than construction (with the aid, if necessary, of extrinsic evidence), as opposed to conjecture (*y*).

Gift by unmarried testator to his children.

Since the Wills Act, a will not operating as an appointment is revoked by marriage (unless expressed to be made in contemplation of marriage under section 177 of the Law of Property Act, 1925), and a gift by an unmarried person by will to his or her children cannot, therefore, take effect in favour of legitimate children. Consequently, if a testator, being unmarried, has illegitimate children, and makes a will giving his property to "my children," this is good as regards the children then in existence and reputed to be his (*z*). It seems, however, that the principle does not apply where the testator is ignorant of the fact that the children are illegitimate (*a*) (as where he does not know that his supposed wife has a husband still living). And of course the principle does not apply to after-born children (*b*); a gift to after-born illegitimate children may be good, but such cases rest on a different principle (*c*).

Again, as Mr. Jarman points out (*d*), "if a married man, after making a disposition in favour of his children by a particular woman, shows, by the context of the will, that he expects both his wife and the woman in question to survive him, this, being incompatible with the supposition of his contemplating marriage with her, is considered to indicate that he means *illegitimate* children only" (*e*).

Gift to children of two persons who cannot marry.

It seems clear that if there is a gift to "the children of A and B," two persons who are within the prohibited degrees, and there are at the date of the will children whom the testator knows by reputation as children of A and B, they are entitled under the gift (*f*).

(*y*) See *per* James, L.J., in *Crook* v. *Hill*, L. R. 6 Ch., at p. 315; and *per* Lords Chelmsford and Cairns, in *Hill* v. *Crook*, cited *post*, p. 1736.

(*z*) *Clifton* v. *Goodbun*, L. R. 6 Eq. 278. In this case the will was that of a single woman, and the question of reputation did not, therefore, arise. Compare also *In the Estate of Frogley*, [1905] P. 137.

(*a*) *Per* Bowen, L.J., in *Re Bolton*, 31 Ch. D., at p. 553.

(*b*) See *per* Kay, J., in *Re Bolton*, 31 Ch. D., at p. 547.

(*c*) *Post*, pp. 1747 *seq.*

(*d*) First ed., Vol. II, p. 137.

(*e*) *Wilkinson* v. *Adam*, 1 V. & B. 422; 12 Pr. 470. Of this case, Sir J. K. Bruce said it had often been considered to go to the extreme verge of the law: *Warner* v. *Warner*, 15 Jur. 141.

(*f*) In the fourth and fifth editions of this work it was laid down that "a gift to the children of A. by B., (who are within the prohibited degrees,) must necessarily mean illegitimate children, since A. and B. cannot contract a lawful marriage," and in support of this doctrine, *Re Goodwin's Trust*, L. R. 17 Eq. 345, was cited. In that case the testatrix, who had gone through the ceremony of marriage with X, her deceased sister's husband, gave her property upon trust for all and every her children and child by X: at the date of the will she had one child, and she afterwards had another; they both had the reputation of being her children by X. It was admitted, *sub silentio*, that the first-born child was entitled to take under the gift, and it was held by Jessel, M.R., on the authority of *Occleston* v. *Fullalove* (*post*, p. 1749), that the second child was entitled to share. This part of

Children "now living" or "born."

It is clear that where the gift is to the children "now living" of a person who has no other than illegitimate children at the date of the will, they are entitled, at all events if their existence is known to the testator (*g*). So where the gift is to the children "born or to be born," or "begotten or to be begotten," of A: if at the date of the will A has none but illegitimate children, and their existence is known to the testator, they will take, unless, it seems, A afterwards has legitimate children born during the testator's lifetime (*h*). And the fact that the testator believes the children to be legitimate is immaterial (*i*).

Children of deceased person.

Upon the same principle, a gift to "the children of C," a person who at the date of the will was dead, leaving illegitimate, but no legitimate, children, is good as to such illegitimate children, if the facts that C was dead and that he had children were known to the testator (*k*), but it is not (apparently) necessary that the testator should know that they were illegitimate; it is sufficient that he should know of the existence of persons reputed to be the children of a deceased person (*l*).

In *Re Taylor* (*m*), the testatrix gave a share of her residuary estate upon certain trusts "during the life of the widow of the late H," and subject thereto in trust for the child or children of H, who being a son should attain twenty-one, or being a daughter should attain that age or marry. H had one child born before his marriage. The testator knew that H was dead having left a widow and one child and there was no evidence that the testatrix knew that the child was illegitimate (*n*). Eve, J., held (distinguishing *Holt* v. *Sidney* and *Lord Woodhouselee* v. *Dalrymple*) that the illegitimate child took no interest. The case is interesting because if the will had been made a year after H's death, the testatrix must

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the decision is clearly bad law (*Re Bolton*, *post*, p. 1755), but it seems equally clear that the first-born child was entitled to the whole fund, as a *persona designata*, for the reasoning of North, J., in *Re Shaw*, [1894] 2 Ch. 573, would not apply to such a case. See *Lepine* v. *Bean*, L. R. 10 Eq. 160.

(*g*) *Blundell* v. *Dunn*, cit. 1 Mad. p. 433, "though," as Mr. Jarman remarks (1st ed.), Vol. II, p. 135, n.), "the construction was somewhat aided by the context." In this case the gift was to the testator's own children, so that it properly falls under the principle stated *post*, p. 1738.

(*h*) *Holt* v. *Sindrey*, 38 L. J. Ch. 126. The principle of the decision was treated as doubtful by James, L.J., in *Crook* v. *Hill*, L. R. 6 Ch., at p. 317; but it was quoted as a binding authority in *Re Du Bochet*, [1901] 2 Ch., at p. 445. The decision in *Re Nixon*, 2 Jur. (N.S.) 970, turned on the validity of the marriage by reputation. *Gabb* v. *Prendergast*, 1 K. & J. 439, was a settlement *inter vivos*.

(*i*) *Holt* v. *Sindrey*, 38 L. J. Ch. 126, *supra*.

(*k*) *Lord Woodhouselee* v. *Dalrymple*, 2 Mer. 419; *Re Herbert's Trusts*, 1 J. & H. 121; *Milne* v. *Wood*, 42 L. J. Ch. 545.

(*l*) See *Re Herbert's Trusts*, *supra*.

(*m*) [1925] Ch. 739.

(*n*) Now such a child would be legitimated by the Legitimacy Act, 1926, *ante*, p. 1723.

have been referring to H's existing illegitimate child. She contemplated the possibility of H's widow being *enceinte*; but if the widow had given birth to only one child, it would seem that the testatrix in referring to "children" must have included the illegitimate child. H could only have legitimate *children* if his widow had given birth to twins.

Gift to children of single woman past child-bearing.

If a testator gives property to the children of a woman who, to his knowledge, has children living at the date of the will, and is also known by him to be past the age of child-bearing, those children will take under the gift, although they are illegitimate, provided she has no legitimate children (*o*).

So if the testator has no children by his wife, who is living and past the age of child-bearing at the date of the will, a gift to "my children" may take effect in favour of his illegitimate children living at the date of the will (*p*).

Intention to refer to existing children.

Whatever the language used, if the intention is manifest to benefit objects existing at the date of the will, and there are no legitimate children then in existence, illegitimate children will be entitled. Some of the cases, as might be expected, run very near each other: thus a gift to "the first-born son of my daughter A" (a spinster), was held not to designate an existing illegitimate son (*q*); but a gift to "my sister A (who was a spinster) and her two youngest daughters," was held to designate individuals then in existence, and consequently to entitle the two youngest of three existing illegitimate daughters of A (*r*).

How intention to include illegitimate children may appear.

The foregoing cases fall under the general principle that illegitimate children may take under a gift to "children" where it is impossible, from the circumstances of the parties, that any legitimate children should take under the gift (*s*). Consequently, it is essential that there should be no legitimate children, for in the class of cases which we have just considered illegitimate children can never take in competition with legitimate children (*t*). We have now to consider a different class of cases, in which legitimate children, if there are any, take together with illegitimate children. In this class of cases, "there is upon the face of the will itself, and upon a just and proper construction and interpretation of the words used in it,

(*o*) *Re Eve*, [1909] 1 Ch. 796. *Re Brown's Trust*, L. R. 16 Eq. 239, seems to have been decided on the principle above stated, and it is recognised in *Re Brown*, 63 L. T. 159. The decisions in *Re Overhill's Trusts*, 1 Sm. & G. 362, and *Paul* v. *Children*, L. R. 12 Eq. 16, are not inconsistent with the principle, as in them the evidence of the testator's knowledge was insufficient.

(*p*) *Lepine* v. *Bean*, L. R. 10 Eq. 160.

(*q*) *Durrant* v. *Friend*, 5 De G. & S. 343.

(*r*) *Savage* v. *Robertson*, L. R. 7 Eq. 176.

(*s*) *Per* Lord Cairns in *Hill* v. *Crook*, L. R. 6 H. L., at p. 282.

(*t*) Compare *Re Fish*, [1894] 2 Ch. 83.

an expression of the intention of the testator to use the term 'children' not merely according to its *prima facie* meaning of legitimate children, but according to a meaning which will apply to, and which will include, illegitimate children" (*u*). It will be noticed that the difference between this class of cases and those above referred to is that in them it was impossible that legitimate children should take, while in those now to be considered the term "children" may include legitimate as well as illegitimate children.

Where number is specified.

For example, as Mr. Jarman points out (*x*), "legitimate and illegitimate children may, of course, be comprehended in the same devise, under a *designatio personarum* applicable to both; as where a testator, having four children, two of each kind, gives to his *four* children *then living*. This would be a gift to them, not as a fluctuating class, with a possibility of future accessions, but to four designated individuals; and it being found that, to make up the specified number, it was necessary to include as well those who strictly and properly answered to that character, as those who had obtained a reputation of being such persons, the inevitable conclusion is, that the latter were included in the testator's contemplation."

Where number of children affects the construction.

So if a testator gives property to "the children" of a deceased person, and at the date of the will there are, to the knowledge of the testator, two or more children of that person living, only one of whom is legitimate, the illegitimate child or children will be included in the gift (*y*).

Legitimate and illegitimate children referred to by name.

On the same principle, if a testator refers by name to several persons, some of whom are legitimate and the others illegitimate,

(*u*) *Per* Lord Cairns, in *Hill* v. *Crook*, L. R. 6 H. L., at p. 283.

(*x*) First ed., Vol. II, p. 147.

(*y*) *Gill* v. *Shelley*, 2 R. & My. 336 (where the illegitimacy was known to the testatrix, but this seems not to be essential); *Re Embury*, 111 L. T. 275; *Leigh* v. *Byron*, 1 Sm. & G. 486. *Re Humphries*, 24 Ch. D. 691. Mr. Jarman criticises the cases of *Hart* v. *Durand*, 3 Anst. 684, and *Swaine* v. *Kennerley*, 1 V. & B. 469. As he points out (1st ed., Vol. II, p. 137): the only apparent distinction between *Swaine* v. *Kennerley* and *Gill* v. *Shelley*, is, that in the former "the bequest was to *child* and children, but which, it is conceived, makes no real difference, since the testator evidently uses the singular number, not with a view to the then existing state of the class, but in contemplation of the possible event of its being reduced to a single object in the interval between the making of the will and the death of the testator. It is submitted, therefore, that the cases of *Swaine* v. *Kennerley* and *Hart* v. *Durand*, may be considered as overruled." See *Leigh* v. *Byron*, *supra*, as to words referring to an only child. In *Edmunds* v. *Fessey*, 29 Bea. 233, the testator gave to each of the sons and daughters of his late cousin a legacy of £100. The cousin had two legitimate sons, one illegitimate son, and one illegitimate daughter: it was held by Romilly, M.R., that the illegitimate daughter was entitled to a legacy, but that the illegitimate son was not. At the present day the principle laid down in *Hill* v. *Crook* (*post*) would probably be applied to such a case, so as to admit all the children.

as the "children" of A, and in the same will makes a gift in favour of "the children of A," the illegitimate children will, as a general rule, be included in the gift (*z*).

Effect of "including" illegitimate child.

In earlier days this doctrine was applied somewhat strictly. Thus, in *Meredith* v. *Farr* (*a*), there were two gifts, one to "the children of A," and the other to "the children of A, including her daughter Elizabeth"; at the date of the will A had six legitimate children and two illegitimate children, one named Elizabeth, and the other named Keziah : it was held that Elizabeth was not entitled to share in the first gift : that she was entitled to share in the second gift, and that Keziah was altogether excluded. Again, in *Re Wells' Estate* (*b*), the testator made various gifts to "my son Thomas," and afterwards directed six shares of his property to be divided among "all my children living at my decease, except my son Thomas"; he left seven children, of whom two, Thomas and Ann, were illegitimate; it was held that Ann was not entitled to a share. In other words, by styling *some* illegitimate children of A his "children," the testator does not necessarily prove that he means *all* illegitimate children of A to be viewed in the same light (*c*). The distinction made [in *Meredith* v. *Farr*] between Elizabeth and the illegitimate children of C, with regard to their admission to the first bequest, corresponds with the difference in grammatical sense, which in strictness exists between the words "namely" and "including." "Namely" imports interpretation, *i.e.*, indicates what is included in the previous term; but "including" imports addition, *i.e.*, indicates something not included. But this is narrow ground (*d*).

Separate reference to illegitimate child.

Again, in *Bagley* v. *Mollard* (*e*), a testator gave certain property to his "grandchild Elizabeth, the only surviving child" of his son William, and gave the residue of his property to all the children of his sons James and William, and of his daughter Sarah; Elizabeth was illegitimate and William had no

(*z*) *Evans* v. *Davies*, 7 Ha. 498. See *Hartley* v. *Tribber*, 16 Bea. 510; *Meredith* v. *Farr*, 2 Y. & C. C. C. 525; *Owen* v. *Bryant*, 2 D. M. & G. 697; *Worts* v. *Cubitt*, 19 Bea. 421. And see *Smith* v. *Jobson*, 59 L. T. 397, where it was held that a share given to an illegitimate daughter went over under a clause providing for the death of "any of my children."

(*a*) 2 Y. & C. C. C. 525. See *Re Corsellis*, [1906] 2 Ch. 316.

(*b*) L. R. 6 Eq. 599, cited *ante*, p. 1726, in connection with the rule laid down in *Cartwright* v. *Vawdry*, etc.

(*c*) See *per* Wigram, V.-C., *Dover* v. *Alexander*, 2 Hare, at p. 281; *Edmunds* v. *Fessey*, 29 Bea. 233 (as to the illegitimate sons).

(*d*) The concluding portion of this paragraph (from "In other words") is taken from the fourth edition of this work, by Mr. Vincent, Vol. II, p. 228. In *Re Smilter*, [1903] 1 Ch. 198, where the passage was referred to in argument, Kekewich, J., said that in *Meredith* v. *Farr* nothing turned on the meaning of the word "including."

(*e*) 1 R. & My. 581.

other child; it was held by Leach, M.R., that she did not share in the residue, on the ground that "whenever the general description of children will include legitimate children it cannot also be extended to illegitimate children." This principle is erroneous (*f*), and in such cases it is merely a question of intention. Thus, in *Megson* v. *Hindle* (*g*), a testator gave to "my grandson James, the son of my daughter Alice Jane," the sum of £500, with power to apply the income for his maintenance, but if he died under twenty-one the £500 and the unapplied income were to go in augmentation of a legacy of £2,000 "hereinafter bequeathed upon trusts in favour of the children and issue of my said daughter Alice Jane"; the legacy of £2,000 referred to was bequeathed for the benefit of "all the children of my said daughter" living at a certain time and the issue of deceased children: Alice Jane left seven children, of whom James was illegitimate; it was held that the whole scheme of the will showed an intention on the part of the testator to make a separate provision for the illegitimate grandson, and not to include him in the gift to the "children" of Alice Jane. If, however, the scheme of the will is consistent with illegitimate children, previously named, being included in a gift to "children," they will, as a general rule, be admitted to share, in accordance with the principle of the modern cases (*h*).

"Dictionary" principle of construction.

Hill v. *Crook.*

For since *Bagley* v. *Mollard* [1830], and *Meredith* v. *Farr* [1843], were decided, a more liberal principle of construction has been adopted, which may be shortly described as the "dictionary" principle. It was clearly laid down in *Hill* v. *Crook* (*i*). In that case the testator had a daughter Mary, who (as he knew) had gone through the form of marriage with John Crook, her deceased sister's husband, and had issue by that connection; by his will, after referring to his "son-in-law John Crook," he bequeathed certain leaseholds in trust for "my daughter Mary, the wife of the said John Crook," for her separate use, "independent of her present or any after-taken husband," and afterwards in trust for "the child, if only one, or all the children if more than one, of my said daughter Mary Crook," with other clauses referring to his daughter as "Mary Crook"; it was held in the House of Lords that, although there was no reason why legitimate children might not take under the bequest, yet that two children of the testator's daughter by John Crook, who were born before the date of the will, and had acquired the reputation of being the children of John Crook, were entitled.

(*f*) *Ante*, p. 1733, *post*, p. 1736.
(*g*) 15 Ch. D. 198.
(*h*) *Re Parker*, [1897] 2 Ch. 208. and other cases cited *post*, p. 1736.
(*i*) L. R. 6 H. L. 265, affirming *Crook* v. *Hill*, 6 Ch. 311.

Lord Chelmsford said : " I know of no objection in law to a gift to children, with a clear intention that it shall apply to existing illegitimate children, being so applied, although after-born illegitimate children must be excluded, and the gift be extended to future legitimate children." Lord Cairns treated it as clear that a testator might, by appropriate words, show an intention to " use the generic term ' children ' so as to include illegitimate children along with legitimate children." The only question was, did the will in that case, upon a just and proper construction of its terms, show an intention so to use it. In his opinion it did. He said : " The terms ' husband ' and ' wife,' ' father ' and ' mother,' and ' children,' are all correlative. If a father knows that his daughter has children by a connection which he calls a ' marriage ' with a man whom he calls her ' husband,' terming the daughter the ' wife ' of that husband, I am at a loss to understand the meaning of language if you are not to impute to that same person when he speaks of the ' children ' of his daughter this meaning, that as he has termed his daughter and the man with whom she was living ' wife ' and ' husband,' so, also, he means to term the offspring born of that so-called marriage the children according to that nomenclature (*k*). If you find that that is the nomenclature used by the testator, taking his will as the dictionary from which you are to find the meaning of the terms he has used, that is all which the law, as I understand the cases, requires."

Modern cases.

The " dictionary " principle laid down in *Hill* v. *Crook* has been followed in numerous modern cases (*l*), and the canon of construction acted on by Leach, M.R., in *Bagley* v. *Mollard* (*m*), and by Lord Lyndhurst in *Fraser* v. *Pigott* (*n*) is clearly erroneous. Thus, in *Re Brown* (*o*), a testator, after referring to J. L. B. as " my son-in-law," gave property to " my daughter M. A. M., the wife of the said J. L. B.," and " my daughter A., the wife of W. W.," and gave his residue to his " children." His daughter M. A. M. B. was illegitimate, but it was held that she was entitled to share in the residue as one of the testator's " children."

(*k*) Quoted by Lord Sterndale, M.R., in *Re Bleckly*, [1920] 1 Ch. 450, at p. 461.

(*l*) *Re Horner*, 37 Ch. D. 695. *Re Jodrell*, 44 Ch. D. 590, aff. *sub nom. Seale Hayne* v. *Jodrell*, [1891] A. C. 304; *Re Harrison*, [1894] 1 Ch. 561; *Re De Wilton*, [1900] 2 Ch. 481 (the headnote of which is incomplete); *Re B.*, [1916] 1 Ir. R. 364, and see the cases on gifts to illegitimate relations (*Re Fish, In b. Ashton, Re Corsellis*, etc., cited, *post*, pp. 1758-9). As to *Re Kiddle*, 92 L. T. 724, and *Re Couturier*, 96 L. T. 560; see *post*, p. 1741.

(*m*) *Ante*, p. 1734.

(*n*) You. 354. The decision in *Re Brown*, 58 L. J. 420, also appears to be contrary to the modern principle of construction.

(*o*) 62 L. T. 899; *Re Walker*, [1897] 2 Ch. 238; *Re Parker*, [1897] 2 Ch. 208; *Re Smilter*, [1903] 1 Ch. 198.

Extension of the "dictionary" principle.

The decision in *Re Loveland* (*p*) seems to be based on the "dictionary" principle of construction, but it goes considerably beyond the principle laid down by Lord Cairns in *Hill* v. *Crook*. In *Re Loveland* there was no reference to illegitimate children (*q*), the gift was to the children of an unmarried woman who was not described as "the wife" of the testator with whom she was living, but alternatively by her own surname and by his surname ("D. D. W., otherwise D. D. L.") (*r*), and it was restricted to her children living at his decease: it was held that a child *en ventre* at the date of the will and born a few weeks afterwards, was entitled under the gift: not, apparently, on the ground that the gift was in favour of children who should acquire the reputation of being the offspring of the testator and D. D. W., but on the ground that the testator intended to provide for the illegitimate children of D. D. W. born in his lifetime, without regard to their paternity or reputed paternity. The inference was drawn from the relation between the parties, the way in which the woman was described in the will, and the fact that the gift was restricted to children living at the testator's decease.

This principle of construction may be said to have been carried to its extreme limit in *O'Loughlin* v. *Bellew* (*s*), where the gift was to the children of "my daughter Mary E. O'Loughlin"; the daughter's real name was Bellew, but she was living with a man named O'Loughlin, and had several illegitimate children by him, who were treated by the testatrix as her grandchildren: it was held that they were the objects of the gift.

Testator's knowledge that parties were not legally married.

It is to be observed that in *Hill* v. *Crook* it appeared, though the decision does not seem to be altogether dependent on the fact, that the testator was aware that a valid marriage could not possibly be contracted between Mary Crook and John Crook. The importance of the fact seems to lie in this, that it made it unnecessary to prove that the testator knew that the parties were not legally married. For if a testator describes A as the wife of B, and bequeaths property to "the children of A," this will not entitle the illegitimate children of A and B to take, unless it is proved that the testator knew the actual nature of the connection between A and B (*t*).

(*p*) [1906] 1 Ch. 542; stated *post*, p. 1752.

(*q*) As in *Re Hastie's Trusts*, 35 Ch. D. 728, *post*, p. 1751.

(*r*) The parties had gone through the form of marriage in Scotland; in that country it is usual in formal documents to describe a married woman by her maiden name and to add her married name, prefaced by "or" or "otherwise."

(*s*) [1906] 1 Ir. R. 487.

(*t*) *Re Brown*, 63 L. T. 159. This appears to have been the ground of the decision in *Re Ayles' Trusts*, 1 Ch. D. 282 (see *per* Stirling, J., in *Re Horner*, 37 Ch. D., at p. 695), although in *Ellis* v. *Houston*, 10 Ch. D. 236, *post*, Malins, V.-C., seemed to think that the decision in *Re Ayles' Trusts*

In *Re Pearce* (*u*) the gift was to all or any the children or child of F. F. had six illegitimate children born to him by K., and two children by his marriage with S. after the death of K. The six illegitimate children were received as legitimate. F. had told the testatrix that they were his children by his first wife, and it was held that only the two legitimate children took under the gift.

Testator's belief that children are legitimate may be immaterial.

Under a gift to the children of A, his illegitimate children in existence at the date of will are entitled, if sufficiently indicated, even although the testator believes them to be the legitimate children of A (*x*).

Re Lowe.

In *Re Lowe* (*y*), the testator gave to each of his brother Joseph's children, " except his eldest son E. J. and his daughter M. L., £100," and made various other dispositions in favour of " the present wife " of Joseph and his " children "; elsewhere in the will he referred to " my nephew E. J." and the " brother of E. J. next in seniority." Joseph had been married many years before and had two legitimate daughters, of whom M. L. was one. After his wife's death he cohabited with B, by whom he had seven illegitimate children, including E. J.; one of them was born after the date of the will. The testator believed that Joseph was lawfully married to B. It was held that the illegitimate children, other than the child born after the date of the will, were entitled to the benefits given to Joseph's " children " in the same way as if they had been legitimate.

Separate provision made for illegitimate child.

The doctrine laid down in *Hill* v. *Crook* does not apply in cases where the context shows that the testator intends to make a difference between legitimate and illegitimate children (*z*).

Where testator is married and has no legitimate children.

In the case of a testator who at the time of making his will is married, and has illegitimate, but no legitimate, children, it was formerly considered that (in the absence of other indications of intention) a bequest by him to " my children " might be taken to refer to his illegitimate children. But this doctrine is erroneous, and even if the circumstances strongly point to the conclusion that the testator intended to provide for his illegitimate children, this is, after all, mere conjecture, which cannot prevail unless it is supported by the wording of the will.

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turned on the fact that A and B married after the date of the will and had a legitimate child.

(*u*) [1914] 1 Ch. 255. Evidence that a settlor called a son legitimate is not admissible to introduce him into a class if he is not legitimate: *Khoo Hooi Leong* v. *Khoo Hean Kwee*, [1926] A. C. 529.

(*x*) *Holt* v. *Sindrey*, 38 L. J. Ch. 126; *Re Plant*, 47 W. R. 183.

(*y*) 61 L. J. Ch. 415.

(*z*) *Megson* v. *Hindle*, 15 Ch. D. 198

Dorin v. *Dorin.*

The general principle is clearly laid down in *Dorin* v. *Dorin* (*a*), where a man, having two illegitimate children, afterwards married their mother, and next day made his will, wherein he called her his "wife," giving his property to her for life and afterwards to "his children" by her; he died without lawful issue, and it was held in the House of Lords that the remainder failed. Lord Hatherley said, "It is not because you find in the outward circumstances that there are some children whom you think the testator ought to have provided for, that the will must be taken to mean that they are to be provided for, when the words in the will can have full and complete effect given to them if you interpret them in another and a legal sense without altering a single word." And Lord Cairns said: "Supposing it had been in the testator's mind not to take any notice of these children in his will, but to make a provision for them in some other way, and to use his will to designate merely any legitimate children who might be afterwards born, would not every word in the will be satisfied?"

Gift to "children" of another person.

The same principle applies where the gift is to the "children" of another person: thus, in *Ellis* v. *Houstoun* (*b*), the testatrix bequeathed property to her brother Charles and his wife Elizabeth for their lives, and after their decease to all the children of her brother living at the death of the survivor: at the date of the will Charles had three children by his first wife, two children by his second wife, Elizabeth, before marriage, and one child by her after marriage: it was held that the illegitimate children could not take. The reason given by Malins, V.-C., namely, that the illegitimate children could not take because there were legitimate children to answer the description is, it is submitted, unsound (*c*): the true reason is that as Elizabeth was the wife of Charles at the date of the will the case fell within the principle of *Dorin* v. *Dorin*. So in *Re Brown* (*d*), the testator had a son G. who was married and had long been separated from his wife, by whom he had no children: at the date of the will (his wife being still living) G. had several children by another woman, all of whom were known by the testator to be illegitimate, but were treated by him as the children of G.; it was held that they could not claim under a gift to "the children" of G.

Application of rule in *Dorin* v. *Dorin.*

The decision in *Dorin* v. *Dorin* undoubtedly re-established the old rule, as to the strict interpretation of the word "children" when used without explanatory context, but even now the

(*a*) L. R. 7 H. L. 568, reversing L. R. 17 Eq. 463. *Godfrey* v. *Davis*, 6 Ves. 43, *ante*, p. 1727, has been cited for the same point; but there the will was not by the putative father.

(*b*) 10 Ch. D. 236. Compare *Warner* v. *Warner*, 15 Jur. 141.

(*c*) See *per* Stirling, J., in *Re Horner*, 37 Ch. D., at p. 709.

(*d*) 61 L. T. 463.

application of the rule is often a matter of some difficulty. Thus, in *Laker* v. *Hordern* (*e*), where the testator had no legitimate children, a gift to " my daughters " was held to mean existing illegitimate daughters. So in *Re Haseldine* (*f*), the testator bequeathed " the following legacies to the following persons, (that is to say) "—here followed legacies to persons mentioned by name, and then—" and to each of the children of M. A. L. the sum of £5 for mourning, the same to be paid into the hands and on the receipt of the said M. A. L., their mother, for them, notwithstanding her coverture and their minority." He afterwards made a codicil giving further benefits to " the children of the said M. A. L." M. A. L. had been married seven years at the date of the will : she never had any legitimate children, but she had at the date of the will three young children by her husband before marriage. The testator was aware of these facts. Kay, J., thought the case was governed by *Dorin* v. *Dorin* : on appeal, Cotton, L.J., was of the same opinion, but Bowen and Fry, L.JJ., thought that the will and codicil referred to existing persons, and that the illegitimate children were entitled.

Intention to benefit existing persons.

The decision in *Re Haseldine* seems to lay down an intelligible principle, namely that a testator may, by using words which obviously point to circumstances existing at the date of the will, show that he refers to illegitimate children then living. On this principle the much discussed case of *Beachcroft* v. *Beachcroft* (*g*) appears to have been rightly decided. There a testator who resided in the East Indies, and was a bachelor, and had had several children by a native woman, bequeathed as follows : " To my children, the sum of pounds sterling, 5,000 each; to the mother of my children, the sum of sicca rupees, 6,000, which I request my executors will secure to her in the most advantageous way." The question was, whether the illegitimate children were entitled, and Plumer, V.-C., decided in the affirmative. As he pointed out, the language of the will and the nature of the dispositions, clearly showed that the testator had existing persons in his mind. The same principle was followed by Wood, V.-C., in *Dilley* v. *Mathews* (*h*).

Re Du Bochet.

In *Re Du Bochet* (*i*) the testatrix bequeathed her residuary estate upon certain trusts for the children being daughters of her nephew R., of her niece Mrs. A., and of her niece Mrs. H.; R. had illegitimate daughters, but no legitimate ones; the testatrix

(*e*) 1 Ch. D. 644.
(*f*) 31 Ch. D. 511.
(*g*) 1 Mad. 430. The decision was criticised at some length by Mr. Jarman (1st ed.), Vol. II, pp. 140 *seq.*, and was disapproved in *Re Overhill's Trust*, 1 Sm. & G. 362, and in *Holt* v. *Sindrey*, 38 L. J. Ch. 126.
(*h*) 11 Jur. (N.S.) 425.
(*i*) [1901] 2 Ch. 441.

believed that R. was married and that his daughters were legitimate. It was held by Joyce, J., that the illegitimate daughters of R. born before the date of the will were entitled to share with the legitimate daughters of A. and H. : but in *Re Pearce* (*k*) the Court of Appeal overruled *Re Du Bochet* (*l*).

Overruled by *Re Pearce.*

The decision in *Dorin* v. *Dorin* does not affect such cases as *Hill* v. *Crook* (*m*), where the testator refers to two people as man and wife, and bequeaths property to their children, knowing that they are not married, and that their children are illegitimate. The decisions in *Re Horner* (*n*) and *Re Harrison* (*o*) proceeded on this ground. Nor does it affect those cases in which the testator refers to two people as man and wife, not knowing that they are not legally married, and shows by the language of his will that in giving property to their " children " he means to benefit their existing children (*p*).

Effect of *Dorin* v. *Dorin.*

On principle it would seem that to enable an illegitimate person to share in a gift to " children," " grandchildren," or the like, under the dictionary rule of construction, it is not essential that he should be expressly referred to as a " child " or " grandchild," and that it is sufficient if the relationship is stated indirectly. It is true that a different conclusion was arrived at in *Re Hall* (*q*); there the testator described R. W. and H. B. as " my two nephews," and gave his residue to the " children " of his brothers and sisters : R. W. was an illegitimate child of one of the testator's sisters : H. B. was a legitimate nephew : it was held that the fact of R. W. being described as a " nephew " of the testator did not entitle him to share as a " child " of the testator's sister. But in *Re Kiddle* (*r*), where the testatrix referred to her illegitimate son as " my son George," and gave her residue to her grandchildren, it was held that the children of George were entitled to share. Again, in *Re Couturier* (*s*), a testatrix gave legacies to various persons by name, describing them as her grandsons : some of them were the legitimate, others the illegitimate, children of her daughter F. : she gave her residue to the children of her daughter F. : it was held that the illegitimate children of F. were entitled to share.

Whether relationship may be inferred.

(*k*) [1914] 1 Ch. 254, *ante*, p. 1738, approving *Re Brown*, 63 L. T. 159.
(*l*) [1901] 2 Ch. 441.
(*m*) *Ante*, p. 1736.
(*n*) 37 Ch. D. 695.
(*o*) [1894] 1 Ch. 561.
(*p*) *Holt* v. *Sindrey*, 38 L. J. Ch. 126, *ante*, p. 1738. The case of *Re Plant*, 47 W. R. 183, was extremely near the line.
(*q*) 35 Ch. D. 551. In *Re Walker*, [1897] 2 Ch. 239 and *Re Smilter*, [1903] 1 Ch. 198, the question turned on the meaning of the word " issue."
(*r*) 92 L. T. 724.
(*s*) 96 L. T. 560.

Illegitimate children *en ventre.*

Where described as the children of the mother only, gifts valid.

III.—Gifts to Illegitimate Children en ventre.—" It is now clear," says Mr. Jarman (*t*), " that a gift to a natural child of which a particular woman is *enceinte, without reference to any person as the father*, is good. Thus, in *Gordon* v. *Gordon* (*u*), where a testator recited that he had reason to believe that A. was then pregnant *by him*, and subsequently directed that the child *of which she was then pregnant* (not repeating the words ' by me,') should be sent to England, and the expense paid for by an annuity, etc. Two questions were raised; first, whether the bequest was not void, on the principle of the early authorities, as a gift to an unborn bastard; secondly, whether it was not invalid as a gift to an illegitimate child *en ventre sa mère by a particular man.* Lord Eldon said, ' Upon the first of these, which is the general question, I remain of my former opinion, that it is possible to hold, consistently with the opinion of Lord Coke, that, if an illegitimate child *en ventre sa mère* is described, so as to ascertain the object intended to be pointed out, it may take under that description. Then, with regard to the application of that principle to the present case, I studiously abstain from expressing any opinion as to what it would be if the words were " to my child," while I decide that the words being only " the child with which A. is now pregnant," those words will do, so as to give effect to the will in its favour.'

Distinction where described as children by a particular man.

" The distinction between the preceding case, and those in which the paternity forms part of the description, is obvious. Where the gift is to the child with which a particular woman is *enceinte*, generally, the fact of birth is the sole ground of title, and that is easy of ascertainment. On the other hand, a gift to the child with which a woman is *enceinte by a particular man*, introduces into the description of the object a circumstance which the law treats as uncertain, (a bastard being, in respect of his paternal parent at least, *filius nullius*,) and which it cannot, properly, permit to be inquired into; and the devise is therefore, unless the fact in question can be assumed, necessarily void. And this principle, it seems, extends even to gifts by a testator to his own child, if the fact of his parental relation to the object be unequivocally made part of the qualification.

Such a gift held invalid, though proceeding from the father.

" Thus, in the case of *Earle* v. *Wilson* (*x*), where a testator bequeathed to ' such child or children, if more than one, as M. may happen to be *enceinte* of *by me*,' Sir W. Grant held it to be void. There was no gift, he said, to the child of which M. might be *enceinte*, except as the child of the testator. It was not a

(*t*) First ed., Vol. II, p. 149.

(*u*) 1 Mer. 141. See also judgment in *Earle* v. *Wilson*, 17 Ves., at p. 532; *Dawson* v. *Dawson*, 6 Mad. 292.

(*x*) 17 Ves. 528.

matter of indifference to him whether that child should have been begotten by him or another man; therefore he could not do what was required, that is, reject the words 'by me' as superfluous. 'Suppose,' the learned Judge observed, 'the words, "as she may happen to be *enceinte* of by me," could be taken to mean, "as she is now *enceinte* of by me," in which there is considerable difficulty; yet if the rule of law does not acknowledge a natural child to have any father before its birth, the change of phrase would not have the effect of making the bequest good. He means to give to an unborn bastard by a description which the law says such person cannot answer; and if you take away that part of the description, *non constat* that the gift would ever have been made.'

"It will be observed that Lord Eldon in the case of *Gordon* v. *Gordon* (*y*) cautiously abstains from giving an opinion on the point decided by Sir W. Grant in *Earle* v. *Wilson*, and had, it seems, obtained the concurrence of that learned Judge in the opinion he then pronounced. But the authority of *Earle* v. *Wilson* has been since questioned in the case of *Evans* v. *Massey* (*z*), in which a testator, who resided in India, devised as follows:—'Having two natural children, *and the mother supposed to be now carrying a third child*, I bequeath the whole of my property in England at this time, or now on the seas proceeding to England, to be divided equally between them, that is to say, if another child should be born by the mother of the other two, in proper time, that such child is to have one-third of such property.' The testator appointed certain persons guardians of *his* children, and in the bequest of the residue expressed himself thus, 'after paying *my* natural children as aforesaid.' The question was, whether the bequest to the child *en ventre sa mère* was made to it as the child of the testator, or whether, on the other hand, it was not to the child with which the woman was *enceinte*, without reference to the father as an essential part of the description. Richards, C.B., was of opinion that the bequest was good. He considered the case to be distinguished from *Earle* v. *Wilson*, as to which, however, he observed, that he did not understand the grounds upon which it proceeded, and therefore could not entirely accede to it; that the decision excited surprise at the time, and that some of the Judges had intimated upon several occasions dissatisfaction with it. After adverting to what fell from Lord Eldon in *Gordon* v. *Gordon*, the learned Chief Baron proceeded: 'We have therefore only to inquire, in this case, whether there be in the terms of the present bequest,

Evans v. *Massey*.

Gift to illegitimate child *en ventre* held good.

Earle v. *Wilson* questioned by Richards, C.B.

(*y*) 1 Mer. 141, stated *ante*, p. 1742.
(*z*) 8 Pri. 22.

worded as it is, such a condition precedent annexed to it by the testator as by necessary construction requires, in order to give effect to the bequest, the child must be shown to be the testator's child, and that he meant to give it only in case the child should be his; and that not only by matter of implication or argument, but of clear illustration. The testator's words are, "Having two natural children, and the mother supposed to be now carrying a third child." Now he does not say, "with which she is pregnant *by me*," but merely that she is supposed to be pregnant generally, and the time of her delivery would prove that fact; then he bequeaths to such child the legacy in question. It is quite clear that there is nothing in the words of the bequest *so far*, asserting that the child was his, or that he thought so; for, although there can be no doubt that that he did think so, yet he does not in terms make such supposition the obvious and sole motive of the bequest. The words are quite general, merely particularising the child that she was then supposed to be carrying, and that would certainly have excluded an after-begotten child, if his then supposition should turn out to have been incorrect. Now the only difficulty arises from the testator having afterwards, in alluding to the children, called them *his;* and upon that it has been considered that this case is within the reasoning and the principle of the decision in *Earle* v. *Wilson*, because the testator, it is said, plainly means to assert that the children are his, and that the legacy is given to the unborn child as one of his children, and that it is given to it entirely on that consideration, as the basis and condition precedent of the gift. I do not, however, think that these subsequent words can be considered as so applying to the bequest itself, as to modify and control it. They were merely a reference to it, and were not intended to have any effect upon it. The allusion does not show that he meant the child to take only in case of its being his, nor does it amount to an assertion that the child was his, or that the testator considered he was giving to it the legacy solely as his child.'

Remarks on *Evans* v. *Massey.*

"It is to be inferred from the observations of the Chief Baron, that the principle upon which he founded his objection to *Earle* v. *Wilson* is this: that where a testator gives to the child or children with which a particular woman is *enceinte by him*, although he describes the child as his own, yet that he intends to make it the object of his bounty at all events, assuming his parental relation to the child as a fact *not farther to be inquired into;* but, as the learned Judge thought that in the case before him the child was not so described, *Earle* v. *Wilson* remains uncontradicted by his decision. It is clear, however, that the Courts will not act upon the principle of that case, unless the

testator's intention to make the fact of his parentage to the unborn infant an essential part of its description be unequivocally demonstrated."

Whether child *en ventre* may have a name by reputation.

It has been said, however, that a child *en ventre sa mère* is a child *in esse*, and may have a name by *reputation* (*a*). If so, a reputation regarding its paternity acquired at the date of the will by a child *en ventre* should be as efficacious as a reputation then acquired by a child previously born, to bring it within the description of a child by a particular father. But all the cases were argued and decided on the opposite assumption, and Lord Eldon laid it down clearly that until born a child has no reputation (*b*). There appears, at least, to be no case in which reputation acquired before birth has been recognised, and Sir W. James, L.J., has intimated that, in his opinion, there would be great if not insuperable difficulties in the way of proving it (*c*).

Crook v. *Hill*, cor. Hall, V.-C.

The question would seem to have been involved in the facts of *Crook* v. *Hill* (*d*), where, besides the two children born before the date of the will, the testator's daughter Mary had another child born after the testator's death, which (as the testator is stated to have known) was *en ventre sa mère* at the date of the will. There was no specific reference to that child; but it was held by Sir C. Hall, V.-C., that it came within the class described as "the children of my daughter Mary Crook." He observed that as a general rule (*i.e.*, in case of a lawful marriage) a child *en ventre* is included in a trust for children, and continued, "The case, both before the Lord Justices, and before the House of Lords, has proceeded on the view that the testator had thought proper to make a will based on the assumption that the union of his daughter with J. Crook was a legal marriage, and all his dispositions for the objects to take under his will are framed upon this footing. It is clear then that, meaning as he did by the word children the issue of that union, he must be taken to have meant to include a child *en ventre sa mère*."

That is to say, the testator meant this child to be included if it was a child of that "union." Now, the marriage being invalid, the only admissible evidence that the child was the issue of that union was reputation; for, of course, the testator could not cause

(*a*) By Sir E. Sugden, 2 Jo. & Lat., at p. 460; also by Romilly, M.R., 22 Bea. pp. 339, 340. The expression is not accurate. What is meant is that a child *en ventre* may have the reputation of being the child of a particular man.

(*b*) 1 Mer. 152, agreeing with Lord Macclesfield, *Metham* v. *Duke of Devon*, 1 P. W. 529, where dictum as well as decision referred to children by a particular father.

(*c*) In *Occleston* v. *Fullalove*, L. R. 9 Ch. 158.

(*d*) 3 Ch. D. 773, will stated *ante*, p. 1735.

his assumption of the validity of the union to prevail so far as to dispense with this evidence. But no allusion was made to this point, and no such evidence was asked for (*e*); and the decision seems to require the further assumption that the testator intended every child of his daughter born during that "union" to be taken to be a child of that "union": thereby, in effect, eliminating the question of paternity altogether (*e*). In this respect the decision appears to depart from the ground taken in the House of Lords. The reputed paternity of the two elder children was there proved (*i.e.* admitted on demurrer), and was, it is submitted, essential to their claim; for though the gift was to the children of Mary Crook (without saying "by J. Crook"), yet this would have been completely satisfied by applying it to her legitimate children (who, it will be remembered, were considered to be included), and to them alone, if the Court had not found on the face of the will an intention to include her illegitimate children by J. Crook. It is to be observed, however, that the claim of the child *en ventre* was virtually unopposed.

Child afterwards born and gaining repute before testator's death.

But if the child which is *en ventre* at the date of the will is afterwards born, and before the testator's death acquires the reputation of being the child of the person described as father, the difficulty would seem to be removed. Unless the fact of paternity be clearly made a condition of the gift, there appears to be no reason for making a distinction in this respect between a gift specifically to a child *en ventre*, and a gift to children generally, described as by a particular father; and with regard to the latter, as we shall hereafter see, reputation, acquired at any time before the death of the testator, when the will comes into operation, has been held sufficient (*f*).

(*e*) The statement that the testator "knew" of his daughter's pregnancy (even supposing that could be taken for "reputation") seems to imply a species of evidence which the law will not permit to be given. [Note by Mr. Vincent in the fourth edition of this work, Vol. II, p. 243.]

(*f*) *Occleston* v. *Fullalove*, L. R. 9 Ch. pp. 147, 159, 170; *Re Goodwin's Trust*, L. R. 17 Eq. 345; *Perkins* v. *Goodwin*, [1877] W. N. p. 111 (testator not the father). In *Gordon* v. *Gordon*, 1 Mer. 150, the question of subsequent recognition of the child was mentioned, but not determined, her claim being upheld on other grounds. In *Earle* v. *Wilson* and *Evans* v. *Massey* the child was not born until after testator's death. Lord Selborne is reported (L. R. 9 Ch. 158) to have said, "In *Metham* v. *Duke of Devon* the child *en ventre* at the date of the will was born and *in the testator's lifetime acquired the same reputation* (*i.e.*, of being the Duke's child by Mrs. H.), but this child, as well as all others born still later, was excluded": which if correct would put the case in opposition to those cited above. But the italicised portion of the statement is not contained in 1 P. W. 529, nor in R. L. 1718, B. fo. 215. According to the latter book there were but six children of the Duke (the original defendant) by Mrs. H. The plaintiff alleged that five only, including herself, were born before the date of the deed-poll (will), but that Henrietta, the sixth, claimed a share, though born after the death of the testator. Henrietta answered that all six "were born at the time of the said deed, or at leastwise before the said (testator's) death, and the said Duke owned them all" (not saying, in the testator's lifetime). The declaration, extracted 1 P. W. 530 n., is followed by a direction for an inquiry

The foregoing remarks on the question whether a child *en ventre* can have or acquire the reputation of being the child of a particular man, are taken from an earlier edition of this work by Mr. Vincent (*g*). With regard to the last paragraph, there is no doubt that if a testator gives property to his reputed children by a particular woman, and she is, at the date of the will, pregnant of a child which is born before the testator's death and acknowledged by him as his child, it is entitled to take under the gift (*h*). But whether a child *en ventre* at the testator's death can take under such a gift is a question which is still open (*i*). It is also doubtful what words and circumstances are sufficient (in the absence of express words) to show that a gift to the "children" of a woman is intended to take effect in favour of her children reputed to be by a particular man (*k*).

Remarks on the old cases.

With regard to express gifts to illegitimate children *en ventre*, it may be remarked that the distinctions taken in the early cases are somewhat artificial. Where a testator gives property to "the child of which A is now pregnant by me," this is merely a short way of saying what the testators in *Gordon* v. *Gordon* (*l*), and *Evans* v. *Massey* (*m*), said at greater length : it is an admission or expression of belief by the testator, not requiring any further proof, and such a gift ought to be held good. A gift to "the child of which A is now pregnant by B," offers more difficulty, but even in this case there seems no sufficient reason for holding the gift to be void : the statement of paternity is merely an expression of opinion on the testator's part. The gift is certainly not void on the ground of public policy (*n*).

Whether gifts to bastards not *in esse* good.

IV.—Gifts to Future Illegitimate Children.—Mr. Jarman continues (*o*) : "The preceding sections leave untouched the question respecting the validity of a devise or bequest to the

"what children or reputed children of Lord C. (the Duke) by the said Mrs. H. were living at the date of the said deed-poll." No mention is made in R. L. of one of the children being *en ventre* at the date of the deed. This fact depends on P. W.; and Henrietta, being the only one whose claim was disputed, was doubtless that child; but that she had *in the testator's lifetime* acquired the reputation of being a child of the Duke by Mrs. H. or that there were any "other children born still later" does not appear by either book : nor is the date of the testator's death given. The report does not intimate that the inquiry led to any further hearing. (Note by Mr. Vincent in the 4th ed. of this work, Vol. II, p. 243.)

(*g*) 4th ed. Vol. II, p. 242.

(*h*) *Occleston* v. *Fullalove*, L. R. 9 Ch. 147.

(*i*) *Re Bolton*, 31 Ch. D. 542. As to trusts created by deed, see *Re Shaw*, [1894] 2 Ch. 573; *Ebbern* v. *Fowler*, [1909] 1 Ch. 578.

(*k*) See next section.

(*l*) *Ante*, p. 1742.

(*m*) *Ante*, p. 1743.

(*n*) See *per* Hall, V.-C., in *Crook* v. *Hill*, 3 Ch. D., at p. 778.

(*o*) 1st ed. Vol. II, p. 153.

illegitimate children, *not in esse*, of a particular woman, without reference to the father. The state of the law on the subject seems to be this: the early authorities are opposed to gifts to such objects, on the ground 'that the law will not favour such a generation, nor expect that such shall be' (*p*); and modern authority is silent upon the subject (*q*); dicta, however, have been thrown out by recent Judges which cast a doubt upon the old opinion. In *Wilkinson* v. *Adam* (*r*), Lord Eldon observed, that he knew no law against such a devise; but, his Lordship afterwards said (*s*), that whether the cases in Lord Coke (*t*), which were all cases of deeds, had necessarily established that no future illegitimate child could take under any description in a will, whether that was to be taken as the law it was not necessary to decide in that case. He would leave that point where he found it, without any adjudication.

"Undoubtedly, if the objection to gifts of this description was referable simply to the ground of uncertainty, there would be no difficulty in saying, in opposition to the early authorities, that such a devise might be sustained, as it is evident that a gift to the future illegitimate children of a *woman* does not involve greater uncertainty than such a devise to legitimate children. But it is conceived that there remains a serious objection to the validity of such dispositions, on grounds of public policy.

Objection on grounds of public policy.

"To support the great interests of morality, is part of the policy of every well-regulated State, and has long been a principle of the law of England, which has uniformly refused validity to provisions offering a direct incentive to vice; as in the case of bonds given with a view to cohabitation, the fate of which is well known. The same principle, it may be contended, applies to gifts in favour of the objects in question. It is true that *here* the unoffending offspring, and not the delinquent parent, is the subject of them; but it requires no great insight into the ordinary springs and motives of human action, to perceive that bounty to the offspring may act as a powerful engine to subvert the chastity of the parent. Suppose a large estate to be devised to every future *illegitimate* child of an indigent woman, would not such a provision hold out a strong encouragement to incontinency? Cases might be suggested which would place the argument of immoral tendency in a strong point of view; but as such a ques-

(*p*) See *Blodwell* v. *Edwards*, Cro. Eliz. 510.

(*q*) Mr. Jarman wrote, it will be remembered, in 1844, and since then the law on the subject has been settled more clearly.

(*r*) 1 V. & B. 446. But the context shows that he was speaking only of such as were begotten in the testator's lifetime and born "within the longest period allowed for gestation."

(*s*) 1 V. & B. 468.

(*t*) Co. Lit. 3 b.

tion is not likely to occur, since in gifts to future illegitimate children they are generally described as the offspring of a particular man, which renders them indisputably void, the writer will only farther observe, that the view which has been taken of the subject is not at all prejudiced by the decisions, establishing the validity of gifts to bastards *en ventre;* for as in these cases the immoral act, which it is the policy of the law to discourage, has been done, the argument on which the objection is founded, does not apply, and they fall within the principle which allows validity to provisions founded on the consideration of *past* cohabitation."

Lord St. Leonards expressed a clear though extrajudicial opinion that public policy, and not uncertainty, was the ground of objection to gifts to future illegitimate children. Referring to his own argument in *Mortimer* v. *West*, he said he still retained the same opinion as he had then formed after a careful search into the authorities. According to his impression of the authorities, they authorised the position that it made no difference whether the father was referred to or not. That it was on the ground of public policy that such gifts were held to be void, not because of the difficulty or indelicacy which might ensue in pursuing an inquiry as to the paternity of the child (*u*).

Objections as to children begotten after testator's death;

As regards provisions for children to be begotten after the instrument comes into operation—namely, as to deeds the time of execution, and as to wills the time of testator's death—this doctrine is nowhere denied : such children, whether described as the issue of the woman, or of the woman by a particular man, cannot take (*x*). But as to a will there is yet another period to be considered, *viz.* that which comes between its execution and the testator's death. Testamentary provisions for children to be begotten during this period also were held void, as being *contra bonos mores*, by Romilly, M.R. (*y*), and Page Wood, V.-C. (*z*). Indeed, no distinction between the two cases was ever expressly drawn (though it is probably what Lord Eldon hinted at in the passage cited above) until it came to be discussed in *Occleston* v. *Fullalove* (*a*), where a testator gave real and personal estate in trust for his " sister-in-law " M. L. (with whom he had gone through the form of marriage) for life, and after her death for " his reputed children C. and E., and all other the children he

—but not as to children begotten between the will and testator's death.

Occleston v. *Fullalove.*

(*u*) *Re Connor*, 2 Jo. & Lat. at p. 459.

(*x*) *Per* James and Mellish, L.JJ., 9 Ch. pp. 160, 166, 167, 171; *Crook* v. *Hill*, 3 Ch. D. 773 (as to Edward); *Re Harrison*, [1894] 1 Ch. 561.

(*y*) *Medworth* v. *Pope*, 27 Bea. 71, and *Lepine* v. *Bean*, L. R. 10 Eq. 160 (gifts by reputed father). See also *Pratt* v. *Mathew*, 22 Bea. 334, and *per* Lords Chelmsford and Colonsay, L. R. 6 H. L. pp. 278, 280.

(*z*) *Howarth* v. *Mills*, L. R. 2 Eq. 389 (gift by mother).

(*a*) L. R. 9 Ch. 147.

might have, or be reputed to have, by the said M. L. then born or thereafter to be born." A third child of M. L., which was *en ventre sa mère* at the date of the will, was born before the testator's death, and was by him acknowledged and described in the register of births as his. Wickens, V.-C., held that this child was not entitled to share. On appeal, the Court was divided; Lord Selborne agreed with the V.-C.; but James and Mellish, L.JJ., differed from him, and the decision was therefore reversed (*b*).

Rule established by *Occleston* v. *Fullalove*.

The fact that the illegitimate child was *en ventre* at the date of the will was immaterial, for the general principle established by *Occleston* v. *Fullalove* is that a gift to illegitimate children not born at the date of the will, but to be born during the lifetime

(*b*) The following remarks on *Occleston* v. *Fullalove* are taken from the 4th ed. of this work by Mr. Vincent (Vol. II, p. 247): In *Occleston* v. *Fullalove*, Lord Selborne, having delivered his opinion that the gift was void as to the general class of children who might be born after the date of the will, held that as a necessary consequence it was void also as regarded the child *en ventre* at the date of the will, "for the reasons which were well stated by Lord Romilly in *Pratt* v. *Mathew* (22 Bea. 334), against separating from the general class of after-born children a child who was *en ventre sa mère* when the will was made, but to whom there is no gift otherwise than as a member of that general class." Sir G. Mellish, L.J., also with reference (it would seem) to this point, distinguished the case where the will was that of the putative parent from *Metham* v. *Duke of Devon* and *Hill* v. *Crook*, where it was the will of a third person, and where therefore the word "children" might (so far as the construction of the will was concerned) have included children begotten after the death of the testator, which children he did not deny would be prevented from taking on grounds of public policy.

But in *Pratt* v. *Mathew*, Lord Romilly was dealing with a different case from *Occleston* v. *Fullalove*. He rejected the claim of the child *en ventre* in the case before him, not on account of its supposed inseparability from the general class as a member of which it must (if at all) be admitted, but expressly because in his opinion the class included legitimate children only. He decided against the child *en ventre* because it was not a member of the class; Lord Selborne because it was. But claiming under a general gift to "after-born children" does not make the child *en ventre* (who *ex hypothesi* is sufficiently described by it) less a child *in esse*, though the rest of the class not being *in esse* are incapacitated by law. The words are the same for all, but the things signified are different. Why should not the child *in esse* (provided it acquires the necessary reputation in the testator's lifetime) have the benefit of the general rule which regulates gifts to a class, *viz.*, that those members who at the testator's death, or at any time between that event and the period of distribution, are capable of taking, take the whole, and that those members who are incapable, whether by dying in the testator's lifetime, or by attesting the will, or by some other operation of law, take nothing? (See 4 Ch. D. 173.)

Lord Selborne's opinion was limited in terms, and it would appear designedly so, to cases where the general class is restricted, in point of expression or description, to future-born children; and in that respect it differs from the opinion suggested in the distinction taken by Sir G. Mellish; for this applies to cases where the class might include, though it is not restricted to, after-born children. But in *Crook* v. *Hill* (3 Ch. D. 773) no objection to the right of the child *en ventre* at the date of the will was suggested on the ground of its supposed inseparability from those who were begotten after the testator's death; nor, it is conceived, could any such objection have been maintained consistently with the decision previously made in the House of Lords in favour of the two elder children. Mr. Vincent also refers to *Lepine* v. *Bean*, L. R. 10 Eq. 160, *post*, p. 1754, and *Perkins* v. *Goodwin*, [1877] W. N. 111, *post*, p. 1753, n. (*q*), in further illustration of the doctrine that under a gift to illegitimate children as a class those take who are capable, and take the whole.

of the testator, is good, if they can be ascertained without inquiring into the fact of paternity. Reputation of paternity is a fact which can be proved, and therefore a gift to the reputed children of a woman by a particular man is good, if limited to children born during the testator's lifetime (*c*).

Future illegitimate children of a woman.

It follows, *a fortiori*, that a gift to the future illegitimate children of a woman is good, if confined to children born during the testator's lifetime (*d*).

The principle is that as a will is in its essence a secret and revocable document during the testator's lifetime, it does not afford any inducement to immorality (*e*).

Reference to paternity.

In *Re Homer* (*f*) there was a gift to an illegitimate child defined by reference to his paternity. It was held that the Court could not inquire into the paternity of an illegitimate child, and that the gift was void for uncertainty.

Gifts to "children" of a woman;

The question still remains to be considered whether a gift to the "children" of a woman can mean or include unborn illegitimate children. In *Mortimer* v. *West* (*g*), a testator who was married, and was living with a woman named Martha D., gave his real and personal property upon trust after the death of his wife and Martha D. for four persons, A, B, C, and D (described as the children of Martha D.), and "every other child born of the body of Martha D. and living at my decease": the four children so named were illegitimate, and after the date of the will Martha D. had two other children, also illegitimate: Lord Lyndhurst held that the two after-born children did not take, because "children," *prima facie*, means legitimate children, and there was nothing in the will to show "by necessary implication" that illegitimate children were intended to take (*h*).

—may mean her illegitimate children.

On the other hand, in *Re Hastie's Trusts* (*i*), where the testator gave property in trust for "my four natural children by M. E. M., *viz.*, J., C., E., and J. H., and all and every other children and child which may be born of the said M. E. M. previous to and of which she may be pregnant at the time of my death," it was held by Stirling, J., that three illegitimate children born of M. E. M. after the date of the will and before

(*c*) *Re Hastie's Trusts*, 35 Ch. D. 728, *supra*.

(*d*) *Ib.*; *In the Estate of Frogley*, [1905] P. 137 (where the gift was to the testatrix's own children, she being a single woman). *Re Loveland*, [1906] 1 Ch. 542, commented on *ante*, p. 1737, and *post*, p. 1752.

(*e*) Some of the cases also lay stress on the moral duty of a parent to provide for his or her illegitimate children.

(*f*) 115 L. T. 703.

(*g*) 3 Russ. 370.

(*h*) There was a question whether they could take a share of the personalty by reason of the testator having made a codicil after their birth, but this point also was decided against them.

(*i*) 35 Ch. D. 728.

the death of the testator, were entitled to share in the gift (*k*). *Mortimer* v. *West* was not cited, but it may, it is submitted, be treated as overruled. The decision in *Re Hastie's Trusts* is, in fact, an extension of the "dictionary" principle of construction, laid down in *Hill* v. *Crook* (*l*), to future illegitimate children. "The effect of the will," said the learned Judge, "will best be given if we interpolate in the will after the words 'pregnant at my death' the words 'all of whom I am willing to treat as my natural children.'" This simple and rational mode of construction avoids all difficulty as to paternity; it assumes that if the connection were broken off, the testator would make a new will, providing only for the illegitimate children then in existence.

Re Loveland.

The case of *Re Loveland* (*m*) was decided on the same principle. In that case the testator, Loveland, had gone through the form of marriage with his niece, Daisy Dorcas Wooton: he made his will just before starting on a journey, knowing that she was pregnant; by it he gave his residue upon trust for "Daisy Dorcas Wooton, (otherwise Daisy Dorcas Loveland)" for life, and after her death upon trust for "all her children living at my decease": her child was born a few weeks after the date of the will: the testator, who was informed of the birth, died abroad a few months afterwards without having seen the child: it was held by Swinfen Eady, J., that the child was entitled under the gift.

Future illegitimate children of a man.

We have seen that a gift to the "children" of a man may include his reputed illegitimate children born at the date of the will, if the context and the circumstances support that construction (*n*). Whether a gift to the "children" of a man can include his reputed illegitimate children, born or begotten between the date of the will and the date of the testator's death is not satisfactorily settled.

Where testator is not the putative father.

It seems clear that if a testator gives property to "the children" of A (a man), his future illegitimate children cannot take under the gift. If, however, A is to the knowledge of the testator, unmarried, and living with a woman whom the testator refers to in the will as A's wife, there would, on the principle of *Hill* v. *Crook* (*o*), seem to be some ground for holding that by "children" the testator meant "reputed children," so that

(*k*) It is stated in the case that they were known by the testator's surname, but this seems immaterial, as the meaning of the testator was to include all illegitimate children of M. E. M., without reference to paternity or reputed paternity.

(*l*) *Ante*, p. 1735.

(*m*) [1906] 1 Ch. 542, *ante*, p. 1737.

(*n*) *Ante*, p. 1729. As to children *en ventre*, *see* pp. 1742 *seq.*

(*o*) *Ante*, p. 1735.

A's illegitimate children born in the testator's lifetime, who acquire that reputation, would be entitled to share. The question does not seem to have arisen (*p*). It has, however, been suggested that unless such a gift is restricted to children born or *en ventre* during the testator's lifetime, it cannot take effect in favour of children begotten after the date of the will, because if it were good as regards children not then *in esse*, it would include children who might be born after the testator's death and they clearly cannot be the objects of his bounty (*q*).

Where testator is the putative father.

Again, it is clear as a general rule, that where the testator is married, a gift by him to "my children" cannot include future illegitimate children (*r*). So if he has gone through the form of marriage with a woman whom he believes to be his wife but who has in fact a husband still living, a gift to "my children" cannot include future children by her, although she is in the will referred to as "my wife" (*s*). If, however, a testator who is unmarried and is living with a woman who he knows is not his wife, by his will refers to her as "my wife," and gives property to "my children," it is impossible to suppose that he can intend to provide for his future legitimate children, for the will would be revoked by his marriage; it is clear, both from this consideration and from the reference to the person whom he calls

(*p*) In *Re Lowe*, 61 L. J. Ch. 415, *ante*, p. 1738, the testator believed that A was lawfully married to the woman referred to in the will as his "present wife," and a similar state of facts existed in *Re Du Bochet*, [1901] 2 Ch. 441, *ante*, p. 1740. In neither case, moreover, was the gift restricted to children born during the testator's lifetime.

(*q*) *Per* Mellish, L.J., in *Occleston* v. *Fullalove*, L. R. 9 Ch. at p. 171; *per* Stirling, J., in *Re Hastie's Trusts*, 35 Ch. D. at p. 734; *Re Loveland*, [1906] 1 Ch. 542. If the suggestion is sound, the decision in *Perkins* v. *Goodwin* ([1877] W. N. 111) is open to objection on this score. In that case, by will dated 1851, a testator gave real and personal estate in trust for his wife for life, then "for his sister Mary, wife of R. P., for her separate use, independent of her present or any future husband, for life, and after her death for such children of his (testator's) said sister as should then be living." Mary had gone through the form of marriage with R. P., who was her brother-in-law. By him she had in the testator's lifetime two children, one born before the date of the will, the other several years after, both of whom acquired in the testator's lifetime the reputation of being children of Mary by R. P. These facts were known to the testator. The two children survived their mother, and being sufficiently designated within *Hill* v. *Crook*, were held by Jessel, M.R., to be entitled in equal shares. It is submitted, however, that the decision is correct, and that Mellish, L.J.'s, explanation of the *dicta* of Lords Chelmsford and Colonsay in *Hill* v. *Crook*, that "no gift to unborn illegitimate children is allowed by law," is more ingenious than sound. Lord Cairns expressly dissociated himself from those *dicta*, which are evidently based on the theory held by Sir E. Sugden and other judges of the old school (*Re Connor*, 2 J. & Lat. 456; *Mortimer* v. *West*, 3 Russ. 370; *Pratt* v. *Mathew*, 22 Bea. p. 334) that a gift to unborn illegitimate children, or at all events, to unborn illegitimate children by a particular man, is wholly void. That theory was exploded by the decision in *Occleston* v. *Fullalove*, as regards gifts to future illegitimate children born during the testator's lifetime.

(*r*) Unless, perhaps, his wife is past the age of child-bearing, as in *Lepine* v *Bean*, L. R. 10 Eq. 160, *post*, p. 1754, and *ante*, p. 1750.

(*s*) *Re Bolton*, 31 Ch. D. 542.

his wife, that he intends to provide for his reputed children by her, whether already born or thereafter to be born. The former would take, under the rule in *Hill* v. *Crook* (*t*), and it is difficult to see how the latter can be excluded, for they would have taken under the rule in *Occleston* v. *Fullalove* (*u*), if the gift had been to " my reputed children by my said wife now born or hereafter to be born," and it is impossible to suppose that the testator used the expression " my children " in any other sense. It is true that in *Pratt* v. *Matthew* (*y*), Romilly, M.R., decided, " with much regret," that an after-born illegitimate child could not take under a gift of this character, but the decision proceeded on the notion that an illegitimate child can only take as *persona designata*, and that under no circumstances can a man make a valid bequest to his future illegitimate children, " for they can have acquired no title by repute." The same remark applies to the decision in *Lepine* v. *Bean* (*z*), where a testator having a wife of advanced age, from whom he lived separate, gave real and personal estate in trust for M., a woman with whom he cohabited and whom he called his wife, for her life or widowhood, and afterwards for his children (which upon the context was held to include his natural children by M.) as tenants in common : at the date of the will he had one illegitimate child by M. living, namely L., and afterwards had another; it was held that the latter could not lawfully take, Romilly, M.R., observed that although the testator intended after-born children by this woman to be included, in contemplation of law he had none; because " the law will not allow a gift to be made to after-born illegitimate children " : this, however, is an erroneous view. It is also true that in *Occleston* v. *Fullalove* (*a*), James, L.J., thought that a gift to " my future children by A B " implied a condition that they should be really the testator's children, which would make the gift void, but as a gift to " my children by A B already born " takes effect in favour of the testator's reputed children by A B already born (*b*), it is difficult to see why a gift to " my children by A B hereafter to be born " should not take effect in favour of A B's after-born children who acquire the reputation of being by the testator. In *Re Bolton* (*c*), Bowen, L.J., said : " It is true that although the fact of paternity cannot be inquired into, the reputation of paternity

Lepine v. *Bean.*

(*t*) *Ante*, p. 1735.
(*u*) *Ante*, p. 1749.
(*y*) 22 Bea. at p. 334.
(*z*) L. R. 10 Eq. 160. See *Smith* v. *Charles*, 13 W. R. 224, where the person described as the testator's wife was within the prohibited degrees.
(*a*) L. R. 9 Ch. at p. 163.
(*b*) *Ante*, p. 1749.
(*c*) 31 Ch. D. p 553.

may. The law does not forbid that, and if we could make out from this will that the testator meant that all children of the woman born during his cohabitation with her should be considered or reputed to be his, they might take," and the learned Judge went on to point out that such a construction was inadmissible in that case, because the testator thought he was lawfully married to the woman.

Re Goodwin's Trust.

The principle here suggested was acted on by Jessel, M.R., in *Re Goodwin's Trust* (*d*), where a testatrix bequeathed personalty in trust for A (who had been her late sister's husband) for his life, and after his death for " all my children by A "; it was held that an illegitimate child of the testatrix born several years after the date of the will, and registered by A as the son of himself and the testatrix, was entitled to share. The M.R. said the principle of *Occleston* v. *Fullalove* was that a gift by a man or woman to one of his or her children by a particular person was good if the child had acquired the reputation of being such child as described in the will before the death of the testator or testatrix. It is true that in *Re Bolton* (*e*) Cotton, L.J., dissented from this view. The point, however, did not arise in *Re Bolton*, for in that case the testator did not know that his marriage was invalid : and Bowen and Fry, L.JJ., both declined to express any opinion on the point (*f*). It is therefore submitted that the decision in *Re Goodwin's Trust* has not been overruled by any of the later cases, and is good law.

V.—General Conclusion from the Cases.—It will be seen that the authorities are not in a satisfactory state. This arises to some extent from a gradual change in the view held by the Courts with reference to gifts to illegitimate children. There was formerly a leaning against such gifts, it being supposed that they tended to encourage immorality, and were therefore against public policy. Hence the extreme strictness shown in the old cases in applying the rule that " children " *prima facie* means legitimate children, and can only mean illegitimate children by " necessary implications." At the present day, slight peculiarities of language contained in a will, taken in conjunction with the circumstances of the case, are allowed to show that by " children " the testator meant to include illegitimate children (*g*). So with regard to gifts to future illegitimate children. Sir E. Sugden said in 1845 that a bequest to such

(*d*) L. R. 17 Eq. 345.
(*e*) 31 Ch. D. p. 552.
(*f*) The point also did not arise in *Re Shaw*, [1894] 2 Ch. 573 (deed).
(*g*) See *Re Haseldine*, 31 Ch. D. 511; *Re Loveland*, [1906] 1 Ch. 542; *O'Loughlin* v. *Bellew*, [1906] 1 Ir. R. 487, all referred to *ante*, pp. 1737, 1740.

children was void, and that there was no authority for making a distinction between illegitimate children described as being the children of a particular mother, and those who are described as the children of a particular father. "It is on the ground of public policy," he said, "that such gifts are held to be void" (*h*). The doctrine that gifts to future illegitimate children are void on grounds of public policy, being *contra bonos mores*, was also laid down by Romilly, M.R. (*i*), Page Wood, V.-C. (*j*), and Stuart, V.-C. (*k*). In *Occleston* v. *Fullalove* (*l*), Lord Selborne adhered to this view, but the view expressed in that case by James and Mellish, L.JJ., that a gift to future illegitimate children, born during the testator's lifetime, and capable of being identified without evidence of paternity, is not against public policy, seems now to be established (*m*). It cannot be said, however, that the Courts have yet completely emancipated themselves from the narrow views held by the Judges in former times, especially with regard to gifts to unborn illegitimate children described by reference to paternity (*n*).

Mr. Jarman's "general conclusions."

Perhaps the clearest way of showing the changes made in the law by recent decisions is to set forth "the general conclusions from the cases" stated by Mr. Jarman in the first edition of this work (*o*), and to supplement them by a reference to the modern doctrines.

Mr. Jarman's general conclusions are:

"1st. That illegitimate children may take by any name or description which they have acquired by reputation *at the time of the making of the will;* but that,

"2nd. They are not objects of a gift to *children*, or *issue* of any other degree, unless a distinct intention to that effect be manifest upon the face of the will; and if, by possibility, *legitimate* children could have taken as a class under such gift, illegitimate children *cannot*; though children, legitimate and illegitimate, may take concurrently under a *designatio personarum* applicable to both."

With regard to the degree of "distinct intention," which must be manifested in order to enable illegitimate children to take under a gift to "children," the tendency of modern cases is to infer an intention to benefit illegitimate children from expressions which would not have had that effect in former

(*h*) *Re Connor*, 2 J. & L., at p. 459.
(*i*) *Medworth* v. *Pope*, 27 Bea., at p. 73.
(*j*) *Howarth* v. *Mills*, L. R. 2 Eq. p. 391.
(*k*) *Holt* v. *Sindrey*, 38 L. J. Ch. p. 132.
(*l*) L. R. 9 Ch. 147.
(*m*) *Re Hastie's Trusts*, 35 Ch. D. 728, and other cases cited, *ante*, p. 1751.
(*n*) *Ante*, p. 1742.
(*o*) Vol. II, p. 155.

times (*p*); and it may be evident from the state of the facts, as when a bachelor makes a will in favour of his children, that children must mean illegitimate children.

The notion that legitimate and illegitimate children cannot take concurrently under a gift to "children," as a class was finally exploded by the decision of the House of Lords in *Hill* v. *Crook* (*q*).

"3rd. That a gift to an illegitimate child *en ventre sa mère, without reference to the father*, is indisputably good."

This proposition has never been questioned. It applies also to cases where a gift to the "children" of a woman is construed to mean her illegitimate children, and she is pregnant of an illegitimate child at the date of the will (*r*).

"4th. That a gift to the future, *i.e.* the unprocreated illegitimate child of a *man*, or of a woman by a particular man, *is clearly void*."

The doctrine is undoubtedly accurate in all cases where the gift is conditional on proof of paternity, but it does not apply where the gift is to future children, reputed to be by a particular man, born during the testator's lifetime (*s*). And even where the gift is to "the children hereafter to be born of A by B" it may be doubted whether the testator means the gift to be conditional on proof of paternity; it is probable that when a testator makes a gift to the future illegitimate children of a woman by a particular man he really means children who have the reputation of that paternity; this construction would bring the case within the doctrine of *Occleston* v. *Fullalove* (*t*). The decision of Jessel, M.R., in *Re Goodwin's Trust* (*u*) is, it is submitted, right.

If the gift is to the future children of a man and woman whom the testator believes to be lawfully married, it fails as to their unborn illegitimate children (*v*).

"5th. That a gift by a testator to his *own* illegitimate child *en ventre sa mère* has been decided in one instance (namely in *Earle* v. *Wilson*,) to be also void; but the point admits of considerable doubt."

Mr. Jarman's doubt is strengthened by the tendency of the modern decisions, which are in favour of putting a rational

(*p*) *Hill* v. *Crook*, L. R. 6 H. L. 265; *Re Hastie's Trusts*, 35 Ch. D. 728; and the cases referred to *ante*, p. 1736, n. (*l*).
(*q*) L. R. 6 H. L. 265.
(*r*) *Crook* v. *Hill*, 3 Ch. D. 773.
(*s*) *Ante*, p. 1754.
(*t*) *Occleston* v. *Fullalove*, *ante*, p. 1749.
(*u*) *Ante*, p. 1755.
(*v*) *Re Lowe*, 61 L. J. Ch. 415.

construction on gifts of this nature (*w*). Where a testator makes a gift to "the child of which A is now pregnant by me," it is incredible that he should desire the fact to be proved : he states it as a matter of his own belief.

"6th. That it is very questionable whether, at this day, a gift to the *future* illegitimate children of a particular woman, even irrespective of the father, can be sustained, against the objection founded on the immoral tendency of such a disposition."

This doctrine is exploded (*x*).

It should be added that a gift cannot be made to illegitimate children born after the testator's death (*y*).

Gift to relations means legitimate relations.

VI.—Other Illegitimate Relations.—As a gift to children or other issue imports *prima facie* legitimate children or issue (*z*), so under a gift to nephews, nieces, or other relations, only legitimate relations of the specified degree are as a general rule entitled to take (*a*). Similarly the word "relatives" (*b*) or "next-of-kin" *prima facie* means legitimate kindred.

"Dictionary" principle of construction.

The rule laid down in *Hill* v. *Crook* (*c*) in the case of gifts to children applies also to gifts to collateral relations. Thus, in *Seale-Hayne* v. *Jodrell* (*d*), a testator made bequests to various persons by name, including some persons whom he described as his "cousins," and gave the residue of his estate upon certain trusts for "my relatives hereinbefore named"; it was held that the persons described as "cousins" were entitled to share in the residue, although they were not legitimately related to the testator. So, in *Re Parker* (*e*), the testator, after giving a legacy to his wife's "nephew," R., gave his residuary estate in trust, as to one moiety, for his wife's nephews and nieces; R. was an illegitimate nephew of the testator's wife; she had also several legitimate nephews and nieces : it was held that R. was entitled to share equally with them. If, however, the wife had had two nephews of the name of R., one legitimate and the other illegitimate, the legitimate one would have taken to the exclusion of the other and no extrinsic evidence would have been admissible (*f*); unless, it seems, the language of the will showed

(*w*) See for example, the gift in *Re Hastie's Trusts*, 35 Ch. D. 728, as explained by Stirling, J., *ante*, p. 1751.

(*x*) *Occleston* v. *Fullalove*, L. R. 9 Ch. 147; *Re Hastie's Trusts; In the Estate of Frogley*, [1905] P. 137; *Re Loveland*, [1906] 1 Ch. 54, all cited *ante*, p. 1751.

(*y*) *Occleston* v. *Fullalove; Crook* v. *Hill*, L. R. 6 Ch. 315, *ante*, p. 1749.

(*z*) *Ante*, p. 1725.

(*a*) *Re Hall*, 35 Ch. D. 551; *Re Brown*, 37 W. R. 472.

(*b*) *Re Saville's Trusts*, 14 W. R. 603; *Re Deakin*, [1894] 3 Ch. 565.

(*c*) *Ante*, p. 1735.

(*d*) [1891] A. C. 304.

(*e*) [1897] 2 Ch. 208.

(*f*) *Re Fish*, [1894] 2 Ch. 83.

that the testator applied the description of "nephew" to legitimate and illegitimate relatives indiscriminately (*g*).

Where testator is illegitimate.

If a testator is illegitimate and cannot therefore have any legitimate relatives except descendants, a reference in his will to his brothers, sisters, nephews, nieces, cousins, or other collateral relatives must (if we assume that the testator meant anything) mean illegitimate relatives (*h*). The case is similar to that of a bachelor or spinster who refers to his or her children, which cannot mean legitimate children (*i*). In these cases there is, of course, no necessary implication on the face of the will; the "necessary implication" arises from the state of facts and the words of the will.

Gift to relations of an illegitimate person.

A similar result follows when a testator makes bequests in favour of any collateral relations of an illegitimate person (*k*). In the same way a gift to the "next-of-kin" of an illegitimate person, in default of such person having issue, cannot mean legitimate next-of-kin. Thus, in *Re Wood* (*l*), the testator gave a legacy to each of his seven children by name, and in the case of each daughter directed that in the event of her dying without having had any children, her legacy should go to her statutory next-of-kin: three of the children were illegitimate, including a daughter, who died without having had any children; it was held that her legacy went to the persons who would have been her next-of-kin if she and all the other children had been legitimate.

In *Re Halliwell* (*m*) under a gift to nephews and their children, the children of illegitimate sisters of the testator were in the context held to be included. In *Re Cullum* (*n*) a testator, who was illegitimate but did not know it, gave an ultimate limitation (after previous trusts which failed) to her own right heirs. The testatrix died without issue. It was held distinguishing *Re Wood* that the ultimate limitation failed.

(*g*) *In b. Ashton*, [1892] P. 83.

(*h*) See *Re Corsellis*, [1906] 2 Ch. 316. It is submitted that in such a case it is not a question of "sufficient" certainty, but an inevitable conclusion from the state of facts.

(*i*) *In b. Frogley*, [1905] P. 137. Compare *Re Jeans*, 72 L. T. 835 (step-children).

(*k*) *Re Deakin*, [1894] 3 Ch. 565.

(*l*) [1902] 2 Ch. 542, overruling *Re Standley's Estate*, L. R. 5 Eq. 303, which had already been questioned in *Re Deakin*, and in which Wood, V.-C.'s reasoning is inconsistent with the principle laid down in *Crook* v. *Hill*, L. R. 6 Ch. 311, *ante*, p. 1735.

(*m*) [1916] 2 Ch. 581.

(*n*) [1924] 1 Ch. 540.

CHAPTER XLIV.

JOINT TENANCY, AND TENANCY IN COMMON.

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The new law.

I.—The New Law.—Since 1925 a legal estate cannot subsist in undivided shares in land. The general effect of section 34 and Part IV. of the first Schedule to the Law of Property Act, 1925, is that where under the previous law land would have been held in common, it is now held by trustees in trust for sale and the tenants in common take corresponding beneficial interests, in the proceeds of sale (*a*). Similarly, under section 36, land beneficially limited to persons as joint tenants is held in trust for sale. Further a joint tenancy of a legal estate cannot be severed (section 36, sub-section 2); but one joint tenant can release to the other, and a joint tenancy in an equitable interest may be severed as it could have been before 1926. The following two sections of this chapter must be read subject to the above remarks. The new law does not affect beneficial interests, but it creates a trust for sale and shifts the beneficial interests to the proceeds of sale.

Joint-tenancy and tenancy in common.

II.—Joint-Tenancy.—Under a devise or bequest to a plurality of persons concurrently, it becomes necessary to consider whether they take joint or several interests; and that question derives its importance mainly from the fact that survivorship is incidental to a joint-tenancy, but not to a tenancy in common (*aa*).

(*a*) This statement is too wide if *Re Price*, [1928] Ch. 579 is correct.

(*aa*) Any joint-tenant may, however, by his own conveyance, sever the tenancy as to his own share, and consequently destroy the *jus accrescendi* between himself and his companions. The rules relating to this question do not come within the scope of the present work. It may be mentioned that Stat. 2 Will. 4, c. 17 contains a provision (section 9) to the effect that where a lease containing a covenant against assignment is bequeathed to two or more persons they take as joint-tenants and have no power to sever the joint-tenancy. This Act appears only to have applied to Ireland, and it was repealed by the Statute Law Revision Act, 1874.

Devisees joint-tenants, when.

A devise to two or more persons simply, it has been long settled, makes the devisees joint-tenants (*b*); but this rule is subject to exceptions.

Devisees in tail tenants in common, when;

The first exception exists in certain cases where the estate conferred by the devise is an estate tail; for where lands are devised to several persons and the heirs of their bodies, who are not husband and wife *de facto*, or capable of becoming such *de jure*, either from their being of the same sex or standing related within the prohibited degrees, inasmuch as the devisees cannot either in fact or in contemplation of law (as the case may be) have common heirs of their bodies, they are "by necessity of reason," as Littleton says, "tenants in common in respect of the estate tail" (*c*). As this reason, however, applies only to the inheritance in tail, and not to the immediate freehold, the devisees are joint-tenants for life, with several inheritances in tail, so that on the death of one of them, whether he leave issue or not, the surviving devisee becomes entitled for life to his share under the joint-tenancy (*d*), and the inheritance in tail descends to the issue (if any) subject to such estate for life.

Sometimes a result of this kind is produced by the terms of the will, of which an example is afforded in *Doe* d. *Littlewood* v. *Green* (*e*), where a testator devised to his nieces E. & J., equally between them to take as joint-tenants and their several and respective heirs and assigns for ever; and it was held that they took estates as joint-tenants for life with remainder, expectant in the decease of the survivor, to them as tenants in common.

Nor are those cases within the rule where the devise is to the first, second and other sons of A for life or in tail, for this form of gift is held to imply succession (*f*).

(*b*) A limitation to two persons and the survivor of them, and the heirs of such survivor, does not create a joint-tenancy; it gives a contingent remainder to the survivor: *Vick* v. *Edwards*, 3 P. W. 372; *Re Harrison*, 3 Anst. 836; *Quarm* v. *Quarm*, [1892] 1 Q. B. 184. But if the gift were to two and the survivor, and *their* heirs, they would probably be held to take jointly: *Oakley* v. *Young*, 2 Eq. Ca. Ab. 537, pl. 6; *Doe* d. *Young* v. *Sotheron*, 2 B. & Ad. 628. The question seems to turn on whether the devisees are trustees, and if so whether they must take the fee in order to execute the trust; see *post*, p. 1784.

For an attempt to set up a secret trust by the statement of one joint-tenant against the other: see *Turner* v. *Att.-Gen.*, Ir. R. 10 Eq. 386.

(*c*) Co. Lit. 183 *a*, 184 *a*. See also *Huntley's Case*, Dyer, 326 *a*; *Cook* v. *Cook*, 2 Vern. 545; *Pery* v. *White*, Cowp. 777; *Forrest* v. *Whiteway*, 3 Exch. 367; *De Windt* v. *De Windt*, L. R. 1 H. L. 87.

(*d*) *Wilkinson* v. *Spearman*, in D. P., cit. *Cook* v. *Cook*, 2 Vern. 545, and *Cray* v. *Willis*, 2 P. W. 529. See also Co. Lit. 182 *a*; *Edwards* v. *Champion*, 3 D. M. & G. 202; *Tufnell* v. *Borrell*, L. R. 20 Eq. 194.

(*e*) 4 M. & Wels. 229. See also *Folkes* v. *Western*, 9 Ves. 456; *Ex p. Tanner*, 20 Bea. 374; *Haddelsey* v. *Adams*, 22 Bea. 266; *Re Atkinson*, [1892] 3 Ch. 52.

(*f*) *Cradock* v. *Cradock*, 4 Jur. (N.S.) 626, citing *Lewis* d. *Ormond* v. *Waters*, 6 East, 336. In the latter case it was said it would be different if the gift were to "all and every the sons"; and see *Surtees* v. *Surtees*, L. R.

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Corporations.

A second exception arising from the fact that a corporation and a natural person could not hold property as joint-tenants but only as tenants in common (*g*), occurs in cases of devises or bequests to a natural person and a corporation contained in Wills which came into operation before the 9th of August, 1899. But now by section 1 of the Bodies Corporate (Joint-Tenancy) Act, 1899, it is enacted that "a body corporate shall be capable of acquiring and holding any real or personal property in joint-tenancy in the same manner as if it were an individual; and where a body corporate and an individual, or two or more bodies corporate, become entitled to any such property under circumstances or by virtue of any instrument which would, if the body corporate had been an individual, have created a joint-tenancy, they shall be entitled to the property as joint-tenants"; this enables a corporation to be appointed a trustee jointly with a natural person (*h*).

Formerly husband and wife took by entireties.

A third exception arose where the objects of the devise were husband and wife, who were in law regarded for many purposes as one person; so that formerly they took not as joint-tenants, but by entireties; the consequence of which was that neither could by his or her own separate conveyance affect the estate of the other (*i*).

But now as regards Wills which have come into operation since the year 1882, a husband and wife take as joint-tenants and not by entireties by reason of the operation of the Married Women's Property Act, 1882 (*j*). By Part VI of the First Schedule to the Law of Property Act, 1925, tenancies by entireties are now converted into joint tenancies.

The construction as regards the amount taken by the husband and the wife, in the case of gifts made to them concurrently with other persons, was not however altered by the Married Women's Property Act (*k*).

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12 Eq. 400, acc. In *Allgood* v. *Blake*, L. R. 7 Ex., at p. 355, 8 Ex., at p. 166, the words "all and every the *issue*" were construed by the context to be words of limitation equivalent to "heirs of the body"; and see *Honywood* v. *Honywood*, 89 L. T. 378; 92 L. T. 814, where the reasoning of *Cradock* v. *Cradock* and *Lewis* v. *Waters* was applied and the testator's most probable intention defeated. In *Re Harcourt*, [1920] 1 Ch. 492, *Cradock* v. *Cradock* was applied and *Surtees* v. *Surtees* was distinguished. See also *Re Close's Estate*, [1910] 1 Ir. R. 357.

(*g*) Co. Lit. 190 *a*: *Law Guarantee, etc. Society* v. *Bank of England*, 24 Q. B. D. 406.

(*h*) *Re Thompson's Settlement Trusts*, [1905] 1 Ch. 229. Now that a public trustee, who is a corporation sole, has been constituted, a devise or bequest to the public trustee jointly with one or more natural trustees will probably be common.

(*i*) *Doe* d. *Freestone* v. *Parratt*, 5 T. R. 652; *Back* v. *Andrew*, 2 Vern. 120; Pre. Ch. 1.

(*j*) *Thornley* v. *Thornley*, [1893] 2 Ch. 229.

(*k*) *Re March*, 27 Ch. D. 166.

Before 1926 husband and wife took only one part between them;

It was said by Popham, C.J., that if the gift were to husband and wife and another as tenants in common, they would each take a third part (*l*); and so thought Sir J. Romilly, M.R. (*m*), and apparently Sir L. Shadwell also (*n*). But in *Warrington* v. *Warrington* (*o*), Sir J. Wigram, V.-C., rejected the distinction, thinking that the quantity which the husband and wife took as between them and third parties, was a different question from how they took as between each other. And in *Re Wylde* (*p*) they were held entitled to a moiety only between them, although in another part of the will an equal legacy was given to each of the three persons, husband, wife, and stranger. Some nice distinctions depending upon the husband and wife being named after the other legatee, the omission of the word " and " before the husband's name, and the near relationship to the testator of both husband and wife, and not of one of them only, have been thought sufficient in some cases (*q*) to authorize a departure from this rule, so as to treat the husband and wife as each entitled to share equally with the other legatees. How far such distinctions can be relied upon may be thought doubtful (*r*).

The rule above stated governing devises to husband and wife was also applicable to personalty (*s*).

—unless the gift is to a class.

But the rule does not apply to a gift to a class. Thus in *Re Gue* (*t*) the testator devised and bequeathed his residuary estate " for all and every my nephews and nieces living at my decease or born in due time afterwards who shall live to attain the age of twenty-one years to be equally divided between them, if more than one, including my nephews and nieces to whom I have given legacies as aforesaid." The testator had bequeathed to " my nephew C. S. and his wife memorial rings . . . to be procured by my executors for my said nephew and niece." It was held that C. S. and his wife were entitled to one share each of the residuary estate and not to one share between them.

In *Re Smith* (*u*), the testator bequeathed his residue to all his nephews and nieces living at his decease with a gift over to the children of nephews and nieces who should die in his lifetime, such children to take in equal shares the share which their

(*l*) *Lewin* v. *Cox*, Moo. 558.
(*m*) *Marchant* v. *Cragg*, 31 Bea. 398.
(*n*) *Paine* v. *Wagner*, 12 Sim. 184.
(*o*) 2 Hare, 54.
(*p*) 2 D. M. & G. 724.
(*q*) *Warrington* v. *Warrington*, 2 Hare, 54; *Paine* v. *Wagner*, 12 Sim. 184. See *Bricker* v. *Whatley*, 1 Vern. 233; *Re Dixon*, 42 Ch. D. 306.
(*r*) *Gordon* v. *Whieldon*, 11 Bea. 170.
(*s*) *Atcheson* v. *Atcheson*, 11 Bea. 485; *Moffat* v. *Burnie*, 18 Bea. 211; *Ward* v. *Ward*, 14 Ch. D. 506; *Re Bryan*, 14 Ch. D. 516.
(*t*) 67 L. T. 823, affd. [1892] W. N. 132.
(*u*) [1892] W. N. 106.

respective parent would have taken if he or she had survived the testator. A nephew and niece had intermarried and died, leaving children, before the testator. It was held that the children were entitled to two shares, one in respect of each parent.

The rule was founded on the doctrine of English law that husband and wife are, for most purposes, one person. And yet any indication, however slight, of an intention that each shall take separately, has been held to defeat the application of this doctrine (*x*). The rule was held not to apply where the gift is to A (husband) *and* (wife) the word "and" implying that the husband and wife are to take as two persons (*y*).

New law.

But as regards wills coming into operation after 1925 the rule is abrogated by section 37 of the Law of Property Act, 1925, which provides that a husband and wife shall for all purposes of acquisition of any interest in property be treated as two persons.

Devise to co-heiresses.

It may be mentioned here that under a devise to the testator's right heirs, where the testator leaves co-heiresses they take, by virtue of section 3 of the Inheritance Act, 1833, as joint-tenants and not as coparceners (*z*).

Gift to parent and children.

A fourth exception to the rule that a gift to two or more simply creates a joint-tenancy is found in those cases more fully discussed hereafter (*a*), where a gift to A and his children has, on slight grounds, been held not to create a joint-tenancy in parent and children, which is its primary effect, but to make A tenant for life with remainder to his children. It has been already seen that where one devises lands to A in fee, and in another part of his will devises the same lands to B in fee the weight of authority inclines to a joint-tenancy between A and B (*b*).

Joint-tenancy in chattels:

A bequest of chattels, whether real or personal, to a plurality of persons, unaccompanied by any explanatory words, confers a joint, not a several interest (*c*), and that whether the gift be by way of trust or not (*d*), and, notwithstanding the disposition of

(*x*) *Dias* v. *De Livera*, 5 A. C. 123, at p. 135.

(*y*) *Hawkins on Wills* (3rd ed.), p. 152; *Re Dixon*, 42 Ch. D. 306; *Re Jeffery*, [1914] 1 Ch. 375. The case of *Re Jupp*, 39 Ch. D. 148, is of doubtful authority.

(*z*) *Owen* v. *Gibbons*, [1902] 1 Ch. 636; *Re Baker*, 79 L. T. 343.

(*a*) *Newill* v. *Newill*, L. R. 7 Ch. 253, and other cases *post*, p. 1875; but see *Re Nolan*, [1912] 1 Ir. R. 416 (joint tenancy); *Re Astbury*, [1926] W. N. 336.

(*b*) *Ante*, p. 547.

(*c*) Lit. s. 381; *Shore* v. *Billingsly*, 1 Vern. 482; *Willing* v. *Baine*, 3 P. W. 113; *Barnes* v. *Allen*, 1 B. C. C. 181.

(*d*) *Aston* v. *Smallman*, 2 Vern. 556; *Bustard* v. *Saunders*, 7 Bea. 92.

—in pecuniary legacies and residues of personalty.

the Courts of late years to favour tenancies in common, the same rule is now established as to money legacies, and residuary bequests (*e*), in opposition to some early authorities (*f*), and the doubts thrown out by Lord Thurlow in *Perkins* v. *Baynton* (*g*), It is observable, however, that in another case (*h*) he relied wholly upon the words of severance, as constituting the legatees of a money legacy tenants in common; from which Lord Alvanley inferred that he had never made the observations imputed to him (*i*); but Lord Eldon has referred to them in a manner which leaves no doubt of the fact, although he has placed the general question beyond controversy, by stating his own opinion generally to be, " that a simple bequest of a legacy or a residue of personal property to A and B, without more, is a joint-tenancy " (*k*).

Rule applies to gifts to children as a class;

—although members of the class may become entitled at different times;

The rule that a gift to two or more simply creates a joint-tenancy, applies indiscriminately to gifts to individuals and gifts to classes (*l*), including, it should seem, dispositions in favour of children, notwithstanding Lord Hardwicke's objection in *Rigden* v. *Vallier* (*m*) to apply the construction to provisions by a father for his children, on account of its subjecting them to be defeated by survivorship. It also applies to a gift to children in remainder, or *quasi* remainder, after a prior estate for life (*n*). Such a gift it has been seen vests the property in such of the children as are living at the death of the testator, with a liability to be divested *pro tanto* in favour of objects coming into

(*e*) *Shore* v. *Billingsly*, 1 Vern. 482; *Webster* v. *Webster*, 2 P. W. 347; *Cray* v. *Willis*, *ib.* 529; *Willing* v. *Baine*, 3 *ib.* 113; *Campbell* v. *Campbell*, 4 B. C. C. 15; *Morley* v. *Bird*, 3 Ves. pp. 629, 632; *Whitmore* v. *Trelawny*, 6 Ves. 129; *Crocke* v. *De Vandes*, 9 Ves. 197.

(*f*) *Cox* v. *Quantock*, 1 Ch. Cas. 238; *Sanders* v. *Ballard*, 3 Ch. Rep. 214; *Tollet* v. *Tollet*, 2 P. W. 489; *Taylor* v. *Shore*, T. Jones, 162.

(*g*) 1 B. C. C., at p. 118. *Warner* v. *Hone*, 1 Eq. Ca. Ab. 292, pl. 10, cited by his Lordship, does not apply, as it was the bequest of a leasehold house, and there were words of severance.

(*h*) *Jolliffe* v. *East*, 3 B. C. C. 25.

(*i*) See *Morley* v. *Bird*, 3 Ves., at p. 630.

(*k*) *Crooke* v. *De Vandes*, 9 Ves., at p. 204.

(*l*) " Family," *Wood* v. *Wood*, 3 Hare, 65; *Gregory* v. *Smith*, 9 Hare, 708. " Next-of-kin," *Withy* v. *Mangles*, 4 Bea. 358; *Baker* v. *Gibson*, 12 Bea. 101, unless the class is by reference to the Statute of Distributions, *Re Nightingale*, [1909] 1 Ch. 385, *post*, p. 1771. " Issue," *Hill* v. *Nalder*, 17 Jur. 224; *Williams* v. *Jekyl*, 2 Ves. sen. 681; *Re Corlass*, 45 L. J. Ch. 119; 1 Ch. D. 460.

(*m*) 2 Ves. sen., at p. 258.

(*n*) *Oates* d. *Hatterley* v. *Jackson*, 2 Str. 1172; *Mence* v. *Bagster*, 4 De G. & S. 162; *Kenworthy* v. *Ward*, 11 Hare, 196; *Williams* v. *Hensman*, 1 J. & H. 546; *M'Gregor* v. *M'Gregor*, 1 D. F. & J. 63; *Ruck* v. *Barwise*, 2 Dr. & Sm. 510; *Re Corlass*, 45 L. J. Ch. 119; 1 Ch. D. 460 (issue); *Amies* v. *Skillern*, 14 Sim. 428, also is generally cited as in point; but if (as the V.-C. held) the fund there vested in all the children at the same moment, *i.e.*, at the death of the tenant for life, the question did not arise: and so in *Bridge* v. *Yates*, 12 Sim. 645, and *Noble* v. *Stow*, 29 Bea. 409.

existence during the prior life estate, each of whom takes a vested interest at his own birth, and, consequently, at a different time from the rest. In a conveyance at common law such a limitation, according to Lord Coke, creates a tenancy in common. Thus, " if lands be demised for life, the remainder to the right heirs of J. S. and J. N., J. S. hath issue, and dieth, and after J. N. hath issue, and dieth, the issues are not joint-tenants, because the one moiety vested at one time, and the other moiety vested at another time" (*o*). But his doctrine has been usually considered as not applying to conveyances to uses (*p*) or to wills, a distinction thus explained by Sir W. P. Wood, V.-C. : " Under a limitation in remainder of a use to children, they are not, as they come *in esse*, let in with other persons who have not the whole interest; but the whole body always hold the whole interest, letting in other members of the body as they come *in esse*. But at common law, when the interest has once vested in remainder, the interest must vest either wholly or in a moiety; it must be either the one or the other, and there is no mode, as there is in a use, of getting the entirety into the remainderman, and then taking it out of him afterwards by the springing use as soon as the *cestui que use* comes *in esse*. Therefore, you have at once and for all to ascertain whether he would take the whole or a moiety : the intent being that he should take a moiety and not the whole, if he took the whole it would be against the intent. The result is, he takes a moiety and holds it in common with the donee of the other moiety. A devise stands on the same footing in this respect as a conveyance to uses; and in the case of a trust a Court of Equity will follow what is said to be the reason of the rule on uses and devises, *viz.* the intent; and the intent, as appearing by the words, is to create a joint-tenancy" (*q*).

Thus, in *Oates* d. *Hatterley* v. *Jackson* (*r*), where lands were devised to A for life, remainder to B and her children and their heirs; it was held that B took as joint-tenant with her children, and that it was no objection that the estates might commence at different times. So in *M'Gregor* v. *M'Gregor* (*s*), where a testator gave his personal, and the money to arise by sale of his real, estate in trust to pay the income to his children living when the youngest of them should attain twenty-one in equal shares for their respective lives, and after the death of any of them, then

(*o*) Co. Litt. 188 *a*.

(*p*) *Matthews* v. *Temple*, Comb. 467; 1 Ld. Raym. 310; *nom. Earl of Sussex* v. *Temple; Stratton* v. *Best*, 2 B. C. C. 233; *Doe* d. *Hallen* v. *Ironmonger*, 3 East, 533; Sugd. Gilb. Uses, 134, 135, and n. (10).

(*q*) 11 Hare, 196. See *Samme's Case*, 13 Rep. 55; *Shelley's Case*, 1 Rep. 101.

(*r*) 2 Str. 1172.

(*s*) 1 D. F. & J. 63.

as to an equal portion of the fund proportionate to the number of children then living, in trust for the issue of the child so dying: it was held that the issue (construed children) took as joint-tenants. And where the gift, after a life interest to A, was to all and every her child and children, and his, her and their executors, etc., the same construction prevailed (*t*).

—but not if the gift vests in them at different ages.

But where the remainder is limited to vest in such only of the class as attain twenty-one, then of necessity a tenancy in common is created; for there may be several children, some of age, others not, and those who have contingent interests cannot take as joint-tenants with those who have vested interests since there is no mutuality of survivorship (*u*).

Tenancy in common not implied in substituted gift;

Bridge v. *Yates.*

But where a fund is given to several or their issue share and share alike, or to be divided among such as may be living at a stated time and the issue of such as may then be dead, the issue (in either case) to take their parents' share, the general rule is to read the words of severance as affecting the interests of the parents only. Thus, in *Bridge* v. *Yates* (*x*), where a testator gave the produce of his real and personal estate in trust for his wife for life, and after her death "to be equally divided among his children who should be then living, and the issue of such of them as should be then dead, such issue taking only" the deceased parent's share; it was held that the terms of severance referred only to the children, and that the issue of a deceased child, though taking in common with the surviving children, yet *inter se* were joint-tenants of their parent's share. It is otherwise if there are double words of severance, or if the words of severance are repeated and would be tautologous unless applied to the issue (*y*). So, accruing shares will not be held in common merely because that quality is attached to the original shares (*z*). Neither will words importing a tenancy in common in one bequest be extended by implication to another bequest which is connected with the former by the term "also" (*a*).

—nor in gift of accruing shares;

—nor from another gift connected by the word "also."

(*t*) *Morgan* v. *Britten*, L. R. 13 Eq. 28. See also *Surtees* v. *Surtees*, L. R. 12 Eq. pp. 400, 406; *Binning* v. *Binning*, 13 R. 654; [1895] W. N. 116.

(*u*) *Woodgate* v. *Unwin*, 4 Sim. 129, as explained 1 D. F. & J., at p. 74; see also *Hand* v. *North*, 33 L. J. Ch. 556 (immediate gift to two by name "as they come of age"); *Re Jeaffreson's Trusts*, L. R. 2 Eq. pp. 282, 283.

(*x*) 12 Sim. 645; see also *Amies* v. *Skillern*, 14 Sim. 428; *Penny* v. *Clarke*, 1 D. F. & J., at p. 431, *per* Turner, L.J.; *Leak* v. *Macdowall*, 32 Bea. 28; *Coe* v. *Bigg*, 1 N. R. 536; *Lanphier* v. *Buck*, 2 Dr. & Sm., at p. 499; *Heasman* v. *Pearse*, L. R. 11 Eq. 522; 7 Ch. 275; *Re Yates*, [1891] 3 Ch. 53; *Re Battersby's Trusts*, [1896] 1 Ir. R. 600. But see *Shepherdson* v. *Dale*, 12 Jur. (N.S.) 156, *post*, p. 1772; and *Crosthwaite* v. *Dean*, [1879] W. N. 93.

(*y*) *Lyon* v. *Coward*, 15 Sim. 287; and see *Att.-Gen.* v. *Fletcher*, L. R. 13 Eq. 128; *Hodges* v. *Grant*, L. R. 4 Eq. 140; *Re Smith*, 58 L. J. 661; *Re Quirk*, 61 L. T. 364, *post*, p. 1768, n. (*g*).

(*z*) *Webster's Case*, 3 Leo. 19, pl. 45; *Jones* v. *Hall*, 16 Sim. 500; *Leigh* v. *Mosley*, 14 Bea. 605; *Re Woolley*, [1903] 2 Ch. 206.

(*a*) *Cookson* v. *Bingham*, 17 Bea. 262; and see *Jury* v. *Jury*, 9 L. R. Ir. 207, and cases cited *ante*, p. 569.

CHAP. XLIV.

Executory trusts.

It should be observed, that, in carrying into effect executory trusts, the Courts will not make the objects joint-tenants, without a positive and unequivocal expression of intention to that effect. Thus, where (*b*) trustees were directed, as soon as the testator's three daughters attained their respective ages of twenty-one, to convey to them and the heirs of their bodies and their heirs as joint-tenants, and, for want of such issue, over; Lord Hardwicke decreed that the conveyance should be made to the daughters as tenants in common in tail, with cross-remainders, which he thought was the best mode of giving effect to these words. And in *Alloway* v. *Alloway* (*c*), where £6,000 having been given to and among such children as A should appoint, A made her will thus : " Robert give three of the £6,000 I wish to have given to the two elder girls "; on the ground that this was a direction to Robert to deliver to each of the two appointees her separate share, it was held that they took in common.

What words create a tenancy in common.

III.—What Words create a Tenancy in Common.—It may be stated generally, that all expressions importing division by equal or unequal (*d*) shares, or referring to the devisees as owners of respective or distinct interests, and even words simply denoting equality, will create a tenancy in common. Thus, it has been long settled that the words " equally to be divided " (*e*), or " to be divided " (*f*), will have this effect; and so, of course, will a direction that the subject of gift shall " be distributed in joint and equal proportions " (*g*).

" To be divided."

"In joint and equal proportions."

(*b*) *Marryat* v. *Townly*, 1 Ves. sen. 102. See also *Synge* v. *Hales*, 2 Ba. & Be. 499; *Taggart* v. *Taggart*, 1 Sch. & Lef. 84; *Owen* v. *Penny*, 14 Jur. 359; *Head* v. *Randall*, 2 Y. & C. C. C. 231; *Mayn* v. *Mayn*, L. R. 5 Eq. 150. But see *White* v. *Briggs*, 2 Phill. 583; and a trust to settle or convey (*De Havilland* v. *De Saumarez*, 14 W. R. 118; *Re Bellasis' Trust*, L. R. 12 Eq. 218) or that property shall " be left " (*Mence* v. *Bagster*, 4 De G. & S. 162; *Noble* v. *Stow*, 29 Bea. 409) is not necessarily executory. As to issue taking *per stirpes* under a direction to settle personalty upon A and her issue see *Stanley* v. *Jackman*, 23 Bea. 450. See further on this subject, *post*, Chap. XLVIII, p. 1827.

(*c*) 4 Dr. & War. 380. See *Mathews* v. *Bowman*, 3 Anst. 727.

(*d*) *Gibbon* v. *Warner*, 14 Vin. Ab. pp. 484, 485.

(*e*) 3 Rep. 39 *b*; 1 Salk. 226; 1 Vern. 65; 2 Vern. 430; 1 Eq. Ca. Ab. 292, pl. 6; Moore, 594; 1 P. W. 34, 14; 1 Ld. Raym. 622; 12 Mod. 296; 2 P. W. 280; 3 B. P. C. Toml. 104; 1 Wils. 165; 1 Ves. 13, 165; 1 Atk. 493, 494; 3 B. C. C. 25; *ib.* 215; 1 D. & Ryl. 52; 5 B. & Ald. 464, 636.

(*f*) *Peat* v. *Chapman*, 1 Ves. Sen. 542; *Ackerman* v. *Burrows*, 3 V. & B. 54.

(*g*) *Ettricke* v. *Ettricke*, Amb. 656. As to whether under a gift to certain persons and their issue or descendants, with words creating a tenancy in common, the issue or descendants will take as tenants in common as between themselves, see *Re Quirk*, 61 L. T. 364; *Re S. Smith's Trusts*, *ib.*, 164; 58 L. J. Ch. 661; *Re Flower*, 62 L. T. 216.

Words importing division create tenancy in common.

"Equally."

"Respectively."

"Severally."

"Each of their respective heirs."

"Between."

"Amongst."

"Each" of several.

"All to have part alike," etc.

Anything which in the slightest degree indicates an intention to divide the property must be held to abrogate the idea of a joint-tenancy, and to create a tenancy in common (*h*). Accordingly, a devise or bequest to several persons, "equally amongst them" (*i*) or "equally" (*k*), or "in equal moieties" (*l*), or "share and share alike" (*m*), or "respectively" (*n*), or with a limitation to their heirs "as they shall severally die" (*o*), or "to *each* of their respective heirs" (*p*), or "to their executors and administrators respectively" (*q*), or to several "between" (*r*), or "amongst" them (*s*), or to "each" of several persons (*t*), has been held (in contradiction of some of the very early cases (*u*)), to make the objects tenants in common. And a similar construction has been given (*x*) to a devise to several their heirs and assigns, "all to have part and, alike every of them to have as much as the other." So, where (*y*) the devise was to A and B of lands, "to be enjoyed alike," Lord Mansfield held that they were tenants in common, considering that word as synonymous with "equally."

Charge upon the legatees in moities.

Again, where (*z*) A bequeathed a term of years to her two daughters, they paying yearly to her son £25 by quarterly payments, *viz. each of them* £12 10s. yearly out of the rents of the premises, during his life, if the term so long continued; Jefferies, L.C., held this to be a tenancy in common, the £25 being to be paid by the daughters in moieties.

(*h*) *Per* Lord Hatherley, in *Robertson* v. *Fraser*, L. R. 6 Ch., at p. 699, cited by Joyce, J., in *Re Woolley*, [1903] 2 Ch. 206.

(*i*) *Warner* v. *Hone*, 1 Eq. Ca. Ab. 292, pl. 10.

(*k*) *Lewen* v. *Dodd*, Cro. El. pp. 443, 695 (*Lewin* v. *Cox*), Moore, 558, pl. 759; *Denn* v. *Gaskin*, Cowp. 657.

(*l*) *Harrison* v. *Foreman*, 5 Ves. 207.

(*m*) *Rudge* v. *Barker*, Ca. t. Talb. 124; *Heathe* v. *Heathe*, 2 Atk. 121; *Perry* v. *Woods*, 3 Ves. 204.

(*n*) *Torret* v. *Frampton*, Sty. 434; *Stephens* v. *Hide*, Ca. t. Talb. 27; *Folkes* v. *Western*, 9 Ves. 456. See also *Marryat* v. *Townly*, 1 Ves. sen. 102; *Hawes* v. *Hawes*, *ib.* 13; 1 Wils. 165; *Vanderplank* v. *King*, 3 Hare, 1.

(*o*) *Sheppard* v. *Gibbons*, 2 Atk. 441.

(*p*) *Gordon* v. *Atkinson*, 1 De G. & S. 478. Compare *Ex p. Tanner*, 20 Bea. 374, and *Re Atkinson*, [1892] 3 Ch. 52.

(*q*) *Re Moore's Settlement Trusts*, 31 L. J. Ch. 368.

(*r*) *Lashbrook* v. *Cock*, 2 Mer. 70; *Att.-Gen.* v. *Fletcher*, L. R. 13 Eq. 128.

(*s*) *Campbell* v. *Campbell*, 4 B. C. C. 15; *Richardson* v. *Richardson*, 14 Sim. 526.

(*t*) *Eales* v. *Cardigan*, 9 Sim. 384; *Hatton* v. *Finch*, 4 Bea. 186.

(*u*) See *Lowen* v. *Bedd*, 2 And. 17. But from the correspondence in date (Mich. T. 37, 38 Eliz.), this seems to be the same case as *Lewen* v. *Dodd*, in C. B. Cro. Eliz. 443; in which latter report it appears that Anderson, C.J. (the reporter of *Lowen* v. *Bedd*), and Walmesley, J., were for the joint-tenancy, against Owen and Beaumont, JJ. In Toth. 143 (Ed. of 1671) is cited a case of *Lowen* v. *Lowen*, also apparently the same case, and held a tenancy in common.

(*x*) *Thorowgood* v. *Collins*, Cro. Car. 75. See also *Page* v. *Page*, 2 P. W. 489.

(*y*) *Loveacres* d. *Mudge* v. *Blight*, Cowp. 352.

(*z*) *Kew* v. *Rouse*, 1 Vern. 353; 1 Eq. Ca. Ab. 292, pl. 7. See also *Milward* v. *Milward*, cited 2 Atk., at p. 309.

To pay.

But a simple direction "to pay" a legacy or share of residue to more than one person is not sufficient to make the recipients tenants in common (*a*).

Direction in respect of one legatee's "share."

In another case (*b*), A bequeathed his personal estate to his sons R. and J., and provided that if J. should be desirous to be put out apprentice, a competent sum should be raised "in part of the share" to which he would become entitled; and Macdonald, C.B., held that the latter words were decisive of the testator's intention to create a tenancy in common. Again, where by will residue was given to A and B, and by codicil the testator desired that C should "participate" with them, it was held that they were all tenants in common (*c*), and a gift to two, with survivorship as to one moiety has been held to negative the general right of survivorship characteristic of a joint-tenancy, and to create a tenancy in common (*d*).

The imposition of a restraint on anticipation does not, by itself, convert what would otherwise be a joint tenancy into a tenancy in common (*e*), but clauses of maintenance and advancement will have this effect (*f*) unless they do not apply to the shares of the income in question (*g*).

A gift over of "the share" or "the estate" of one of two joint-tenants upon a contingency does not create a tenancy in common (*h*).

Leaning in favour of tenancy in common.

Referring to such of the cases above cited as had been decided at the time he wrote, Mr. Jarman remarks (*i*): "The preceding cases evince the anxiety of later Judges to give effect to the slightest expressions affording an argument in favour of a tenancy in common; an anxiety which has been dictated by the conviction, that this species of interest is better adapted to answer the exigencies of families than a joint-tenancy, of which the best quality is, that the right of survivorship may, at the pleasure of the co-owners respectively (if personally competent), be defeated by a severance of the tenancy.

"This leaning to a tenancy in common was acknowledged in a case (*k*), where a testator bequeathed to A and B £10,000,

(*a*) *Re Clarkson*, [1915] 2 Ch. 216.

(*b*) *Gant* v. *Laurence*, Wigh. 395. See also *Ive* v. *King*, 16 Bea. 46; *Jones* v. *Jones*, 44 L. T. 642.

(*c*) *Robertson* v. *Fraser*, L. R. 6 Ch. 696.

(*d*) *Paterson* v. *Rolland*, 28 Bea. 347; *Ryves* v. *Ryves*, L. R. 11 Eq. 539.

(*e*) *Re Gardner*, [1924] 2 Ch. 243; *Partriche* v. *Powlet*, 2 Atk. 54 (separate use).

(*f*) *Gant* v. *Lawrence*, Wigh. 395; *L'Estrange* v. *L'Estrange*, [1902] 1 Ir. R. 372, 467; *Bennett* v. *Houldsworth*, 104 L. T. 304; *Re Dunn*, [1916] 1 Ch. 97; *Re Ward*, [1920] 1 Ch. 334; and see *Re Woolley*, [1903] 2 Ch. 206, at p. 211.

(*g*) *Re Gardner*, [1924] 2 Ch. 243.

(*h*) *Re Schofield*, [1918] 2 Ch. 64; *Edwardes* v. *Jones*, 33 Bea. 348.

(*i*) First ed., Vol. II, p. 163.

(*k*) *Jolliffe* v. *East*, 3 Br. C. C. 25.

to be equally divided between them, when they should arrive at twenty-one years, and to carry interest until they should arrive at that age. It was contended that the fund was to be divided *at twenty-one*, the legatees in the meantime taking it jointly; and that, therefore, by the death of one under age, it survived to the other: but Lord Thurlow decided otherwise; observing that the Court decrees a tenancy in common as much as it can."

So where a testator bequeathed a sum to trustees in trust "to pay assign and divide the same equally between all the children" of his daughter, "if more than one as joint-tenants, and if but one then to that one child" (*l*); Sir J. Stuart, V.-C., held that the children took as tenants in common, although the testator had elsewhere bequeathed the residue of his estate unto and equally between two of his grandchildren "as tenants in common."

Under a gift to a class by reference to the Statute of Distribution they take as tenants in common (*m*).

However, in *Barker* v. *Giles* (*n*), where a testator devised "to A and B, and the survivor of them, and their heirs and assigns, to be equally divided between them, share and share alike," it was held that the words equally to be divided referred only to the heirs, and, therefore, that A and B were joint-tenants for life, with several inheritances to them in common. But the terms of gift are not often capable of being thus split up, and words of survivorship will not generally be held to defeat the tenancy in common, but rather to point out a particular period for ascertaining who are to be the devisees; leaving such devisees, when ascertained, to take as tenants in common (*o*).

In *Forrest* v. *Whiteway* (*p*), where there was a devise to A and B, and their heirs, with a gift over in certain events to C and D and their heirs as tenants in common, the Court refused to infer from the gift over that A and B were intended to take as tenants in common.

(*l*) *Booth* v. *Alington*, 27 L. J. Ch. 117; *Oakley* v. *Wood*, 16 L. T. 450 ("to be held jointly or divided equally").

(*m*) *Re Nightingale*, [1909] 1 Ch., at p. 389.

(*n*) 2 P. W. 280; 3 B. P. C. Toml. 104.

(*o*) *Lord Bindon* v. *Earl of Suffolk*, 1 P. W. 96; *Perry* v. *Woods*, 3 Ves. 204; *Russell* v. *Long*, 4 Ves. 551; *Smith* v. *Horlock*, 7 Taunt. 129; *Ashford* v. *Haines*, 21 L. J. Ch. 496. But see *Moore* v. *Cleghorn*, 10 Bea. 423, as to which *qu. Haddelsey* v. *Adams*, 22 *ib.* 266. In *Brown* v. *Oakshot*, 24 Bea. 254, there was a devise of a term to trustees upon trust to pay certain annuities, and the surplus to A and B in equal shares, and subject thereto a devise to A and B in fee, and it was held they took the surplus rents during the term as tenants in common, but the fee as joint-tenants.

(*p*) 3 Exch. 367.

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Gift to compound class.

To the general principle above stated (*q*)—that the Court decrees a tenancy in common as much as it can, and that the slightest indication of an intention to divide the property creates a tenancy in common (*r*)—a curious exception has been established in cases where the gift is to a compound class. If a testator gives a fund to A for life and at his death to be divided amongst his children then living and the issue of children then dead, the issue of a deceased child to take the share which their parent would have taken if living, it would naturally be supposed that the word "divide" governs the whole gift, and that the issue, as well as the children, take as tenants in common. But it seems to be settled that in such a case double words of severance are required to make the issue of deceased children take as tenants in common (*s*). It is true that the contrary was decided by Stuart, V.-C., in *Shepherdson* v. *Dale* (*t*) and by Wood, V.-C., in *Penny* v. *Clarke* (*u*), but in the latter case the gift was followed by a direction that the issue should take "as a class as if by representation, and not as individuals," and the V.-C.'s decision was overruled by the Court of Appeal (*x*). This decision was subsequently treated by Wood, V.-C., as establishing the exception above stated, even in cases where there are no words to counteract the effect of the primary direction to "divide" the fund (*y*), and this view has been adopted by other Judges (*z*).

Double words of severance required.

The same exception obtains when the words of severance follow, instead of preceding, the gift (*a*).

Where gift to a class creates a tenancy in common.

It has been already mentioned that where the gift is to a class, in such a way that the interests of some may be vested while those of others are contingent, a tenancy in common is created (*b*).

To children of several parents "respectively."

In a gift to the children of several persons "respectively," the word may have the effect only of attributing to each parent

(*q*) *Ante*, p. 1770.
(*r*) *Ante*, p. 1768.
(*s*) *Bridge* v. *Yates*, 12 Sim. 645, *ante*, p. 1767.
(*t*) 12 Jur. (N.S.) 156.
(*u*) John. 619, where *Bridge* v. *Yates* is attempted to be distinguished. In *Penny* v. *Clarke* the words of severance followed the gift, but that is immaterial.
(*x*) 1 D. F. & J. 425. In *Re Quirk*, 61 L. T. 364, the words counteracting the effect of the primary direction for division were in their turn counteracted by duplicate words of severance.
(*y*) *Coe* v. *Bigg*, 1 N. R. 536.
(*z*) By North, J., in *Re Yates*, [1891] 3 Ch., at p. 58, where, however, the learned Judge erroneously stated the decision of Wood, V.-C., in *Penny* v. *Clarke*. See *Re Smith*, 58 L. J. Ch. 661, where the question did not arise but the general rule appears to be recognised by Stirling, J.
(*a*) *Ante*, p. 1771.
(*b*) *Ante*, p. 1767.

his own children, and of causing the property to devolve *per stirpes;* the children taking *inter se* as joint-tenants (*c*).

Annuity to several in common "for their lives and the life of the survivor."

When annuities are given to two or more persons in terms which constitute a tenancy in common, the interests of the annuitants will not be varied merely by reason of the annuities being given "for their lives and for the life of the survivor"; these words are sufficiently satisfied by their literal interpretation as fixing the duration of the annuities, and, therefore, upon the death of each annuitant his annuity will devolve upon his representative during the life of the survivor (*d*). But where an annuity was given to each of two persons "for their lives, or the life of the longest liver of them, for their or her own absolute use and benefit," it was held that *reddendo singula singulis*, the two annuities were to be for the benefit of the annuitants during their joint lives; and after the death of either, then during the life of the other both were to be "for her own use and benefit" (*e*).

Mr. Jarman remarks (*f*): "Of course expressions which, standing alone, would create a tenancy in common, may be controlled and neutralised by the context (*g*): and such, it seems, is the effect of the testator's postponing the enjoyment of an ulterior devisee, or legatee, until the decease of the *survivor* of the several co-devisees or legatees for life, which, it is thought, demonstrates an intention that the property shall, in the meantime, devolve to the survivors, under the *jus accrescendi* which is incidental to a joint-tenancy.

Words creating a tenancy in common rejected by force of context.

"Thus, in *Armstrong* v. *Eldridge* (*h*), where a testator devised the residue of his real and personal estate to trustees, in trust to sell, and apply the interest from time to time to the use of his grandchildren, F., C., R., and M., *equally between them share and share alike*, for and during their several and respective natural lives, *and after the decease of the survivor of them*, in trust to apply the principal to and among the children of his grandchildren: Lord Thurlow said that although the words 'equally to be divided,' and 'share and share alike,' were, in

(*c*) *Re Hodgson's Trust*, 1 K. & J. 178; *Hobgen* v. *Neale*, L. R. 11 Eq. 48; *Re Jones's Estate*, 47 L. J. Ch. 775. And see *Davis* v. *Bennet*, 31 L. J. Ch. 337 (where further words of severance created a tenancy in common); and cf. *Re Moore's Settlement Trusts*, *ib.* 368, *ante*, p. 1769.

(*d*) *Jones* v. *Randall*, 1 J. & W. 100; *Eales* v. *Cardigan*, 9 Sim. 384; *Bryan* v. *Twigg*, L. R. 3 Ch. 183, stated *ante*, p. 620; *Chatfield* v. *Berchtoldt*, 18 W. R. 887.

(*e*) *Hatton* v. *Finch*, 4 Bea. 186.

(*f*) First ed., Vol. II, p. 163.

(*g*) See *Clerk* v. *Clerk*, 2 Vern, 323.

(*h*) 3 B. C. C. 215. See also *Doe* d. *Calkin* v. *Tomkinson*, 2 M. & Sel. 165; *Cranswick* v. *Pearson*, 31 Bea. 624, as to which see *per* Rolt, L.J., L. R. 3 Ch., at p. 186; *Kelsey* v. *Ellis*, 38 L. T. 471.

general, construed in a will to create a tenancy in common, yet where the context showed a joint-tenancy to be intended, the words should be construed accordingly; and in this case the interest was to be divided among four while four were living, among three while three were alive, and nothing was to go to the children while any of the mothers were living.

"And the same construction has prevailed even where the ulterior devise was not, in terms, after the decease of the survivor, but after the decease or the deceases of the prior legatees; it being considered that the property is not to go over until the decease of all the legatees, though the words, especially in the latter case, might seem to admit of being construed after the 'respective' deceases, if the Court had felt particularly anxious to avoid the rejection of the words creating a tenancy in common.

"Thus, in *Tuckerman* v. *Jefferies* (*i*), where the testator devised to A and B, to be equally divided between them during their natural lives, *and after the deceases of A and B* to the right heirs of A for ever: it was held, that they were joint-tenants, notwithstanding the words "equally to be divided"; it being considered that the whole was to go over to the heirs of A at once on the decease of the survivor, not that they should take by moieties at several times.

"After decease of E. and G." read after decease of *survivor*.

"So, in the case of *Pearce* v. *Edmeades* (*k*), where a testator bequeathed the residue of his estate to trustees, in trust to pay the interest dividends and produce thereof to his daughter M. for life, and after her decease unto and between her two children E. G. and G. G., during their *respective* lives *in equal shares; and from and after the decease of the said E. G. and G. G.*, upon further trust to pay or transfer and divide the same unto and between all and every the child or children, if more than one, of the said E. G. and G. G., in equal shares; and if but one, then

(*i*) 3 Bac. Ab. Joint-Tenants (F), 681 (6th ed.), Holt, 370, 11 Mod. 108-9. See also *Stephens* v. *Hide*, Ca. t. Talb. 27; *Malcolm* v. *Martin*, 3 B. C. C. 50 (but as to which see cases *post*, p. 1776, n. (*o*); *Townley* v. *Bolton*, 1 My. & K. 148; *M'Dermott* v. *Wallace*, 5 Bea. 142; *Att* v. *Gregory*, 8 D. M. & G. 221; *Begley* v. *Cook*, 3 Drew. 662. See and compare *Re Drakeley's Estate*, 19 Bea. 395. There will be no implied survivorship where such a gift over is preceded by separate gifts of distinct properties for life: *Swan* v. *Holmes*, 19 Bea. 471; *Sarel* v. *Sarel*, 23 Bea. 87; *Lill* v. *Lill*, *ib.* 446; *Brown* v. *Jarvis*, 2 D. F. & J. 168 (where the gift over was, "after the decease of every of them"); *Stevens* v. *Pyle*, 28 Bea. 388: nor, if there is no limitation expressly for the lives of the donees, but the gifts are still separate; in such case the interest passes to the respective representatives till the gift over takes effect: *Bignold* v. *Giles*, 4 Drew. 343. An express gift to the survivors in one event would seem to exclude an implied gift to *them* in the alternative event: *Coates* v. *Hart*, 32 Bea. 349. But if the share of one co-tenant for life is given (until the final gift over) to his children, if any; this leaves the implication in favour of survivors untouched if there are no children: *Walmsley* v. *Foxhall*, 1 D. J. & S. 605.

(*k*) 3 Y. & C. 246; *Ashley* v. *Ashley*, 6 Sim. 358.

Pearce v. *Edmeades.*

to such only child, and if there should be no child of the said E. G. and G. G., living at the time of their decease, or born in due time after the death of the said G. G., then upon further trust for the testator's legal personal representatives. The testator and E. G. died, the latter leaving children, whereupon the entire income was claimed by G. G. as the only survivor; and Lord Abinger, C.B., held that he was entitled. 'It has been settled,' said his Lordship, 'by a series of decisions, that the words "respectively," and in "equal shares," when not controlled by other words in a will shall be taken to indicate the nature of an estate or interest bequeathed, and shall constitute a tenancy in common. But when these words are combined with, or followed by others which would make a tenancy in common inconsistent with the manifest design of the subsequent bequest of the testator, they may be taken to indicate, not the nature, but the proportion of the interest each party is to take. In the present case the bequest to G. G. and E. G. during their lives, is of the interest and dividends only of the residue of the testator's estate. The corpus of the residue is not to be divided or possessed by the legatees till after the decease both of G. G. and E. G.; and then it is to be divided amongst such of their children only as shall be living at the death of the survivor. It is clear, therefore, that the mass of the property is to be divided amongst the children who might survive both the parents, *per capita* and not *per stirpes*. This would be quite inconsistent with a tenancy in common of the parents. Again, the testator, by his care in pursuing this property through three generations, and bequeathing it, upon failure of these, to his then personal representatives, shows that he meant to die intestate of no part of it; but as the interest and dividends only are devised to his grandchildren G. G. and E. G., and nothing is devised to their children till the death of both, it would follow that if G. G. is not entitled to the whole interest and dividends accruing after the death of E. G. during his life, the portions of interest and dividends which she took in her lifetime would be undevised during the remainder of G. G.'s life.'

Remark on preceding cases.

"As in the three preceding cases no act had been done to sever the joint-tenancy (if any), between the several devisees or legatees, it was not necessary to determine whether the effect of the will was to confer a joint-interest, with its incidental right of survivorship, or to create a tenancy in common with an implied gift to the survivor for life. Indeed, no allusion is made to the latter point, except in *Pearce* v. *Edmeades*, and even there it does not appear to have formed the prevailing ground of determination, though perhaps less violence is done to the

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language of the will by implying a positive gift to the survivor than by rejecting the words of severance" (*l*).

The theories on which the cases have been decided are explained by Parker, J., in *Re Hobson* (*m*), in which there was held to be an intestacy in certain shares of income down to the period of distribution.

Intention must be clear.

But the Court will not construe the will as postponing the distribution of every part until the death of the surviving tenant for life, unless an intention so to do is clearly indicated; although the gift in remainder is in terms of the whole fund, and appears therefore to have a simultaneous distribution in view, yet, if a tenancy in common is more consistent with the general context, it will be established especially in favour of children, in spite of the apparently antagonistic terms (*n*). And this construction is readily made where, after the gift to several for life, the remainder is not "after their death," but "at their death"; for the literal meaning, *viz.* the simultaneous death of all, could not have been contemplated, and "at their respective deaths" is a meaning more likely to suit the intention than "at the death of the survivor" (*o*).

Gift over "*at* their death."

Rule stated by Romer, J.

In *Re Errington* (*p*) Romer, J., stated the rule as follows: "Where the testator gives the income of his estate to two people, A and B, for their lives, and follows that gift by a direction that at their death, or at their deaths, or at or after the death or deaths of A and B, the property is to go to their issue, the Court does not construe the gift as a gift only to take effect on the death of both in favour of the issue of both, but

(*l*) *Hurd* v. *Lenthall*, Sty, 211; 14 Vin. Ab. 182, pl. 5. "Where the objects are more than two, the implication, in order to complete the purpose of filling up a chasm which would otherwise occur between the decease of the first and last of the tenants for life, must either give joint estates carrying the right of survivorship, or, which would seem better, must, on the decease of each tenant for life after the first, deal with the accruing share or shares of such deceased tenant or tenants for life in like manner. For instance, suppose the devise to be to A., B., and C., as tenants in common for life, and after the decease of the survivor, over. A. dies; upon which A.'s share passes to B. and C., it is presumed, as tenants in common. Next B. dies; his original share devolves by implied devise to C., but unless his accruing share (*i.e.*, the one-half of A.'s share which came to B. on A.'s decease) can pass to C., such share would be undisposed of during the remainder of his (C.'s) life. The implication, therefore, if admissible at all, must it is presumed, in order to complete its purpose, give B.'s accruing share, as well as the original one, to C." (Note by Mr. Jarman.) *Minton* v. *Cave*, 10 Jur. 86. See also *Marryat* v. *Townly*, 1 Ves. sen. 102.

(*m*) [1912] 1 Ch. 626.

(*n*) *Hawkins* v. *Hamerton*, 16 Sim. 410; *Ewington* v. *Fenn*, 16 Jur. 398; *Doe* d. *Patrick* v. *Royle*, 13 Q. B. 100; and see *Atkinson* v. *Holtby*, 10 H. L. C. pp. 313, 325; *Re Hutchinson's Trusts*, 21 Ch. D. 811.

(*o*) *Arrow* v. *Mellish*, 1 De G. & S. 355; *Willes* v. *Douglas*, 10 Bea. 47; *Re Laverick's Estate*, 18 Jur. 304; *Turner* v. *Whittaker*, 23 Bea. 196; *Archer* v. *Legg*, 31 Bea. 187; *Wills* v. *Wills*, L. R. 20 Eq. 342. See *Re Rubbins*, 78 L. T. 218; 79 L. T. 313 ("*upon* the death" of A, B and C held to mean upon the death of the survivor).

(*p*) [1927] 1 Ch. 421, where the rule was applied to substitutionary gifts.

construes it as a gift to take effect on the death of each of the share of the income to which the deceased was entitled, to the issue of the deceased."

And, if there is a gift to A, B, and C, for their respective lives, and subject thereto for their respective children, on the death of each tenant for life one-third of the property goes to his children (*q*); *a fortiori* if the gift is of separate properties (*r*).

Tenancy in common, with express survivorship, not a joint-tenancy.

Where the will creates a tenancy in common with express survivorship, there is, of course, no pretence for implying a joint-tenancy (*s*), and each devisee or legatee will have, not a severable interest, but an interest with a contingent gift over to be ascertained only by the event. But in *Cookson* v. *Bingham* (*t*), where a testator devised his estates to his daughters, A, B, and C, to be jointly and equally enjoyed or divided in the case of the marriage of any of them; and they, or the survivor in case of death, were authorised to dispose of the same by will or assignment as they should think proper: it was held by Sir J. Romilly, M.R., that the three daughters took as joint-tenants in fee, and that A and B being dead, the whole had survived to C; and Lord Cranworth inclined to the same opinion: but as he thought that if it were not so the survivor alone had power under the latter clause to dispose of the fee by will, it was unnecessary to decide the point.

Distinction between joint-tenancy and tenancy in common as to lapse, etc.

IV.—Lapse and other Miscellaneous Questions.—It follows as a consequence of the survivorship which is incidental to a joint-tenancy, that if the devise fail as to one of the devisees, from its being originally void (*u*), or subsequently revoked (*x*), or by reason of the decease of the devisee in the testator's lifetime (*y*), the other or others will take the whole. But the rule is different as to tenants in common, whose shares, in case of the failure (*z*) or revocation of the devise to any of them, descend to the heir-at-law or residuary devisee of the testator (*a*); unless the devise

(*q*) *Sutcliffe* v. *Howard*, 33 L. J. Ch. 472.

(*r*) *Swan* v. *Holmes*, 19 Bea. 471 and other cases cited *ante*, p. 1774, n. (*i*).

(*s*) *Doe* d. *Borwell* v. *Abey*, 1 M. & Sel. 428; stated *post*, p. 2076. *Hatton* v. *Finch*, 4 Bea. 186; *Haddelsey* v. *Adams*, 22 Bea. 266; *Minton* v. *Minton*, 9 W. R. 586; *Taaffe* v. *Conmee*, 10 H. L. C. pp. 64, 78.

(*t*) 17 Bea. 262; 3 D. M. & G. 668.

(*u*) *Dowset* v. *Sweet*, Amb. 175 (void for uncertainty); *Young* v. *Davies*, 2 Dr. & Sm. 167 (devisee attesting witness).

(*x*) *Humphrey* v. *Tayleur*, Amb. 136; *Larkins* v. *Larkins*, 3 B. & P. 16; *Short* v. *Smith*, 4 East, 418; *Ramsay* v. *Shelmerdine*, L. R. 1 Eq. 129, cited *ante*, p. 405 in Chap. XIII.

(*y*) *Davis* v. *Kemp*, 1 Eq. Co. Ab. 216, pl. 7; *Buffar* v. *Bradford*, 2 Atk. 220; *Morley* v. *Bird*, 3 Ves. 628.

(*z*) *Owen* v. *Owen*, 1 Atk. 494; *Norman* v. *Frazer*, 3 Hare, 84.

(*a*) *Cresswell* v. *Cheslyn*, 2 Ed. 123; 3 B. P. C. Toml. 246; *Boulcott* v. *Boulcott*, 2 Drew. 25.

be to the objects as a class, in which case the individuals composing the class at the death of the testator are entitled among them, whatever be their number, to the entirety of the subject of gift (*b*). The revocation of a gift to some members of a class may have the effect of augmenting the shares of the others (*c*).

Gift implied from power creates a tenancy in common.

Here it may be observed, that where, in the absence of an express gift, a trust is raised by implication in default of execution of a power of distribution (*d*), it is now settled that the objects take as tenants in common (*e*), and it should seem that under an implied gift resulting from a power of selection the same rule prevails (*f*).

In *Re Kerr's Trusts* (*g*), a fund was given upon trust for such of the children of M. as she should by will appoint and in default of appointment for her children equally. M. by will appointed to her "children" E. and C., their administrators and assigns for their own absolute use and benefit. E. was not a legitimate child and therefore not an object of the power. Sir G. Jessel, deciding the case according to common sense and according to what must have been the clear intention of the testatrix, held that the appointment was to E. and C. as tenants in common, that one half of the fund went to C. and the other half in default of appointment.

Effect upon power of lapse of some of the shares.

Where a power is given by will to appoint property among several objects, and the subject, in default of appointment, is given to them individually (and not as a class) as tenants in common, a question sometimes arises whether, by the death of any of the objects, the power is defeated in respect of the shares of those objects. The established distinction seems to be, that if all the objects survive the testator, and one of them afterwards dies in the lifetime of the donee of the power, the power remains

(*b*) *Shaw* v. *M'Mahon*, 4 Dr. & War. 431; *Clark* v. *Phillips*, 17 Jur. 886; *Knight* v. *Gould*, 2 My. & K. 295; *Dimond* v. *Bostock*, L. R. 10 Ch. 358; *Fell* v. *Biddolph*, L. R. 10 C. P. 701; *Re Coleman and Jarrom*, 4 Ch. D. 165; *Lepine* v. *Bean*, L. R. 10 Eq. 160. See also *ante*, p. 407. But see and consider *Re Chaplin's Trusts*, 33 L. J. Ch. 183, cited *ante*, p. 310; *Re Featherstone's Trusts*, 22 Ch. D. 111; and *Re Allen*, 29 W. R. 480; 44 L. T. 240. In *Kingsbury* v. *Walter*, [1901] A. C. 187, the question what determines a class is discussed.

(*c*) *Re Donaldson*, [1915] 1 Ir. R. 63.

(*d*) See *ante*, p. 628.

(*e*) *Reade* v. *Reade*, 5 Ves. 744; *Casterton* v. *Sutherland*, 9 Ves. 445; *Re Phene's Trusts*, L. R. 5 Eq. 346 (to trustees "for the children of A to do what the trustees think best"); overruling *Maddison* v. *Andrew*, 1 Ves. sen. 57 and Lord Hardwicke's dictum in *Duke of Marlborough* v. *Lord Godolphin*, 2 *ib.*, at p. 81; *Re Phene's Trust* was distinguished in *Armstrong* v. *Armstrong*, 7 Eq. 518; and in *Welland* v. *Townsend*, [1910] 1 Ir. R. 177: in both these cases it was held that the children took as joint tenants.

(*f*) *Att.-Gen.* v. *Doyley*, 4 Vin. Ab. 485, pl. 16; *Harding* v. *Glyn*, 1 Atk. 469; *Re White's Trusts*, Joh. 656 ("for such of my children as my trustees may think fit").

(*g*) 4 Ch. D. 600.

as to the whole (*h*). But, on the other hand, if any object dies in the testator's lifetime, by which the gift lapses *pro tanto*, the power is defeated to the same extent (*i*).

The preceding paragraph was quoted with approval by Stirling, J., in *Re Ware* (*k*). The latter rule seems to be derived from the old doctrine that under a power to appoint to a number of persons a substantial share must be appointed to each, and that doctrine having been abolished the foundation for the rule which is supposed to be laid down in *Reade* v. *Reade*, appears to have been removed (*l*).

If, however, under the gift in default of appointment, the objects are joint-tenants, or the gift is to a class, of course the decease of any object, even in the testator's lifetime, as it does not occasion any lapse, leaves the power wholly unaffected.

It may be observed, that as an appointment cannot be made in favour of a deceased child whose share under the gift over had vested, the only mode by which the testator's bounty can be made to reach his representatives is to leave a portion of the fund unappointed; in which case the representatives of the deceased child will take his share (but of course only his share) in the unappointed portion. Lord Eldon, it is true, expressed his disapproval of this "device," in *Butcher* v. *Butcher* (*m*), but he appears to have objected to it as proceeding upon the erroneous notion that it was necessary to enable the donee to appoint the remainder of the fund to the surviving objects: whereas, according to *Boyle* v. *Bishop of Peterborough*, his power is extended over the whole fund. To avoid all such questions, powers have usually been framed so as to authorise an exclusive appointment to one or more of the objects; but this

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(*h*) *Boyle* v. *Bishop of Peterborough*, 1 Ves. jun. 299; *Butcher* v. *Butcher*, 9 Ves. 382; 1 V. & B. 79; *Paske* v. *Haselfoot*, 33 Bea. 125; *Ricketts* v. *Loftus*, 4 Y. & C. 519. As to *Woodcock* v. *Renneck*, 1 Ph. 72, see Chap. XXIII, *ante*, p. 796.

(*i*) "*Reade* v. *Reade*, 5 Ves. 744; see also Sugd. Pow. (8th ed.) 419, where great pains have been taken to establish the position in the text, in opposition to some remarks of the present writer in his volume appended to Powell, Dev. (3rd ed.) 374, which remarks he has not here repeated; for though he is still unable to discover any solid ground for the alleged difference of effect in regard to the power, where the partial failure of the gift takes place *before* and where it takes place *after* the death of the testator, yet as the cases commented on by the distinguished writer in question seem to favour such a doctrine, and as it is really of more importance that the rules on such points should be certain than that they should be decided in the manner most consistent with principle, he has not felt disposed to revive the discussion." (Note by Mr. Jarman.)

(*k*) 45 Ch. D., at p. 275.

(*l*) Farwell on Powers (3rd ed.), p. 187, and see Stirling, J.'s, judgment in *Re Ware*.

(*m*) 1 V. & B., at p. 92.

authority is now conferred by statute (*n*), on the donee of every power of distribution (though created before the statute), except so far as the power expressly requires a specific amount or share to be appointed to any of the objects.

(*n*) 37 & 38 Vict. c. 37. Before this statute a nominal share at least must, notwithstanding 1 Will. 4, c. 46, have been appointed, or left to devolve, to every object.

CHAPTER XLV.

ESTATES IN FEE: ESTATES OF TRUSTEES.

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I. *Wills Act*, 1837	1781	II. *Estates of Trustees*	1783

I.—Wills Act, 1837.—Before the Wills Act, 1837, a devise of land without words of limitation conferred only an estate for life, as was the case with deeds executed before 1926. The old law is omitted in this edition. Section 28 of the Wills Act enacted that unless a contrary intention appeared a devise passed the fee simple or other the whole estate or interest which the testator had power to dispose of by will. After quoting this section Mr. Jarman remarks (*a*) : "The effect of the enactment, it will be observed, is not wholly to preclude, with respect to wills made or republished since the year 1837, the question, whether an estate in fee will pass without words of limitation, but merely to reverse the rule. Formerly, nothing more than an estate for life would pass by an indefinite devise, unless a contrary intention could be gathered from the context. Now, an estate in fee will pass by such a devise, 'unless a contrary intention shall appear by the will.' The *onus probandi* (so to speak) will, under the new law, lie on those who contend for the restricted construction; but as that construction rarely accords with the actual intention of a testator, it will, probably, not often occur, that the Courts will be called on to apply the proviso, which saves the effect of a restrictive context; so that there seems no reason to apprehend that the newly-enacted rule will be so prolific of qualifications and exceptions as that doctrine which it has superseded. Upon the whole, the enlargement of the operation of an indefinite devise may be regarded as one of the most salutary of the new canons of interpretation which have emanated from the legislature."

Remarks on the rule.

The restricted construction will not be adopted merely on the ground that another devise in the will contains formal words of limitation (*b*), or that a special power of appointment is (in

What will show a contrary intention.

(*a*) First edition, Vol. II, p. 194.
(*b*) *Wisden* v. *Wisden*, 2 Sm. & Gif. 396.

terms) given to the devisee (*c*), though if the same land be given in one part of the will to A, and in another to B, the presence of words of limitation in the latter gift, and their absence from the former, are material to correct the apparent contradiction, and to show that the testator meant a gift to A for life, with remainder to B in fee (*d*). So if a testator devises land to several person as joint-tenants and to the survivor of them, his or her heirs and assigns for ever, the language shows a contrary intention within the meaning of section 28 with the result that the devisees are joint-tenants for life, with a contingent remainder to the survivor in fee simple (*e*).

Devise of income of land.

A devise of rents and profits or of income of land now carries the fee simple (*f*). Under the law before 1837 it carried only an estate for life, unless words of inheritance were added (*g*).

Use and occupation of land.

A devise of the "use and occupation" of land seems to give only a life interest, unless an intention to give a greater interest appears (*h*).

Statutory rule does not apply to interests created *de novo*.

The rule of construction has been held not to apply to interests created *de novo;* thus a devise of a rent-charge to A simply, has been held to give him a rent-charge for life only (*i*). And where a testator devised to A "the house she lives in and grass for a cow in G. field," and gave his D. estate (which included G. field) to X., it was held that A took the fee simple in the house, but not in the right of pasturage; the Court being of opinion that grass for a cow was not necessary for the enjoyment of the house, and that the extent of interest in the one was not governed by the other (*k*).

(*c*) *Brook* v. *Brook*, 3 Sm. & Gif. 280. See also *Weale* v. *Ollive* (No. 2), 32 Bea. 421; and as to personalty, *Re Mortlock's Trust*, 3 K. & J. 456. Where the prior devise is expressly for life the question whether the further words give the absolute interest or only a power is the same as before the Act: *Freeland* v. *Pearson*, L. R. 3 Eq. 658; *Pennock* v. *Pennock*, L. R. 13 Eq. 144. See Chaps. XXIII and XXXIII.

(*d*) *Gravenor* v. *Watkins*, L. R. 6 C. P. 500. But for the words of limitation A and B would be joint-tenants, *ante*, p. 1761. As to the cases where a gift *prima facie* absolute is cut down by subsequent words to an estate for life with a power of appointment, see *ante*, p. 1168.

(*e*) *Quarm* v. *Quarm*, [1892] 1 Q. B. 184. The Irish case of *Re Gammon*, [1914] 1 Ir. R. 26, also illustrates a contrary intention.

(*f*) *Plenty* v. *West*, 6 C. B. 201; *Mannox* v. *Greener*, L. R. 14 Eq. 456; *Baker* v. *Blount*, [1917] 1 Ir. R. 316 (share in income). See Chap. XXXV, *ante*, p. 1264; but it seems that a devise of a specific annual sum out of the lands which happens to be the whole amount of the rent does not pass the fee: *Going* v. *Hanlon*, Ir. R. 4 C. L. 144.

(*g*) *Hodson* v. *Ball*, 14 Sim., at p. 571.

(*h*) See *Re Coward*, 57 L. T. 285; *S.C. Coward* v. *Larkman*, 60 L. T. 1. Section 28 of the Wills Act does not apply to such a devise, the right being one created *de novo*; see *supra*, and Chap. XXXV, *ante*, p. 1267, n. (*l*).

(*i*) Chap. XXXI, *ante*, p. 1116.

(*k*) *Reay* v. *Rawlinson*, 29 Bea. 88; and see *Pym* v. *Harrison*, 32 L. T. (N.S.) 817, revd. 33 *ib.* 796 (will before 1838). As to the creation of an easement by implication, or because it is an easement of necessity, see *ante*, p. 69, and Chap. XXXV, *ante*, p. 1260, n. (*m*).

The decision of the House of Lords in the second appeal in *Foxwell* v. *Van Grutten* (*l*), may here be referred to. The principal question in that case was the operation of the rule in *Shelley's Case*. The testator after devising real estate to trustees upon trusts under which his only child took an equitable estate tail, directed that on the death of his child the property should be "legally conveyed and assured unto such heirs of my child or children in equal shares as they shall severally and respectively attain the age of twenty-one years or be married, and to their several and respective heirs and assigns for ever." The question was whether these words were merely ancillary to the words which created the estate tail, or whether they had an independent operation and gave a fee simple to the heir of the testator's daughter. The latter construction prevailed. It is necessarily a technical construction, because the testator was obviously ignorant of the rule in *Shelley's Case*, and therefore could not have used the words in question in the sense attributed to them.

Fee simple conditional in lands not within stat. *De Donis*.

Or in a personal inheritance.

In conclusion, it may be noticed that where copyholds of a manor, in which there was no custom to entail, were devised in terms which, if applied to freeholds, would create an estate tail, the devisee took a fee simple conditional, which became absolute on the birth of issue inheritable under the limitation (*m*), and the same rule applied to a similar gift of a personal inheritance, which, before 1926, could not be entailed (*n*).

The new law.

II.—Estates of Trustees.—After 1925 legal estates in land must be either estates in fee and for a term of years absolute (section 1 of the Law of Property Act, 1925). Consequently the difficult questions which used to arise as to the estate taken by trustees can no longer occur. Trustees must have the fee simple or a term of years absolute. There cannot be a legal estate in an undivided share of land. But where land is settled, the legal fee simple is vested in the tenant for life, or person having the powers of a tenant for life, and the trustees for the purposes of the Settled Land Act, 1925, are required only for the purpose of receiving capital moneys and certain notices. If there is no tenant for life (or person having the powers of a tenant for life) of full age the Settled Land Act trustees become statutory owners, they have the powers of a tenant for life and the legal

The Settled Land Act, 1925.

(*l*) 82 L. T. 272; *W. Gardiner & Co., Ltd.* v. *Dessaix*, [1915] A. C. 1096. See also *Re Bonynge*, [1919] 1 Ir. R. 284 (fee-simple with executory limitation over).

(*m*) *Doe* d. *Simpson* v. *Simpson*, 4 Bing. N. C. 333; 5 Scott, 770; *Doe* d. *Blessard* v. *Simpson*, 3 Scott, N. R. 774; 3 M. & Gr. 929; *Doe* d. *Spencer* v. *Clark*, 5 B. & Ald. 458.

(*n*) *Stafford* v. *Buckley*, 2 Ves. sen. 170; *Turner* v. *Turner*, 1 B. C. C. 316.

estate is vested in them. When the land is not settled the trustees who have the legal fee generally hold on an express or implied trust for sale. If the beneficial interests are held in common there is always a trust for sale.

The Administration of Estates Act, 1925.

It must, however, be borne in mind that since 1898 (Land Transfer Act, 1897, s. 1, replaced by the Administration of Estates Act, 1925, s. 1) the legal estate of the testator or an intestate passes to his personal representatives, and the legal estate does not (since 1925) vest in a devisee until there has been an assent in writing signed by personal representatives and naming the person in whose favour it is given (section 36, subsection 4, of the Administration of Estates Act, 1925). Hence in order to ascertain where the legal fee simple is, the assent must be produced. After the vesting in the devisee the estate will be conveyed or vested by the proper means; an appointment of new trustees is deemed to have the appropriate vesting declaration.

The old rules.

But for the purpose of the transitional provisions of Part IV of the first schedule to the Law of Property Act, 1925, it may still be necessary to ascertain the estate of trustees immediately before the coming into operation of the Act. The subject is treated fully in Chapter XLVI of the last edition of this work, and since questions will now arise so rarely that chapter is omitted in the present edition. It may, however, be convenient that the general principles should be very briefly stated. In *Doe* v. *Nicholls* (*o*), Bayley, J., said: "It may be laid down, as a general rule, that where an estate is devised to trustees for particular purposes, the legal estate is vested in them so long as the execution of the trust requires it, and no longer, and therefore as soon as the trusts are satisfied, it will vest in the person beneficially entitled to it." This is subject to an exception thus stated by Lord Davey (*p*): "Where there are recurring occasions for the exercise of active duties by the trustees and no repeated devises to them to enable them to perform their duties, the legal estate, if once in the trustees, is to be deemed to be vested in them throughout, notwithstanding the duration in the meantime of what would but for the recurring duties be construed as uses executed in the beneficiaries." The general rule was also modified by ss. 30, 31 of the Wills Act. Mr. Jarman says (*q*): "Of all the adjudged points connected with the subject, that which has been deemed the least satisfactory, is the doctrine of those decisions

Trustees took only such estate as is required for the trust.

Recurring trusts.

Implication of indefinite term of years abolished.

(*o*) 1 B. & Cr. 336, at p. 342.

(*p*) *Van Grutten* v. *Foxwell*, [1897] A. C. 658, at p. 683; *Harton* v. *Harton*, 7 T. R. 652.

(*q*) First ed., Vol. II, p. 228.

which, in certain cases, gave to trustees, whose estate was undefined, a term of years (either with or without a prior estate for life), determinable when the purposes of the trust should be satisfied. To exclude the application of this inconvenient and very refined rule of construction, two enactments have been introduced into the statute of 1 Vict. c. 26. The 30th section provides, 'That where any real estate (other than or not being a presentation to a church) shall be devised to any trustee or executor, such devise shall be construed to pass the fee-simple, or other the whole estate or interest which the testator had power to dispose of by will, in such real estate, unless a definite term of years, absolute or determinable, or an estate of freehold, shall thereby be given to him expressly or by implication.'

Wills Act, ss. 30, 31.

"Section 31 provides, 'That where any real estate shall be devised to a trustee, without any express limitation of the estate to be taken by such trustee, and the beneficial interest in such real estate, or in the surplus rents and profits thereof, shall not be given to any person for life, or such beneficial interest shall be given to any person for life, but the purposes of the trust may continue beyond the life of such person, such devise shall be construed to vest in such trustee the fee-simple or other the whole legal estate which the testator had power to dispose of by will in such real estate, and not an estate determinable when the purposes of the trust shall be satisfied.'

Estate of trustees, if not expressly limited, to be either freehold or an estate in fee

"These clauses have been the subject of much criticism (*s*). It is not easy to perceive why the provision regulating the estates of trustees should have been split into two sections, and still more difficult is it to give to each of those sections such a construction as will preserve it from collision with the other. The design of the 30th section would seem to be simply to negative the construction which, in certain cases, gave to a trustee an undefined term of years, for it allows him to take an estate of freehold, or a *definite* term of years, either expressly or by implication; but the 31st section takes a wider range, as it admits of neither of these exceptions, nor that of a devise of the next presentation to a church. Its effect is to propound, in regard to wills made or republished since the year 1837, the following general rule of construction: that whenever real estate is devised to trustees (and it would seem to be immaterial whether the devise is to the trustees indefinitely, or to them and their heirs, or to them and their executors or administrators),

Wills Act, ss. 30, 31.

(*s*) See H. Sugd. Wills, 127; George Sweet on Wills Act, 154; Sugd. R. P. Stat. 380. "I believe the real history of the two sections is that they are two drafts dealing with the same subject, though both remain in the Act," *per* Jessel, M.R., *Freme* v. *Clement*, 18 Ch. D., at p. 514.

for purposes requiring that they should have *some* estate, without any specification of the nature or duration of such estate, and the beneficial interest in the property is not devised to a person for life, or being so devised, the purposes of the trust may endure beyond the life of such person, the trustees take (not, as in *Carter* v. *Barnardiston* (*u*), an estate for years, or, as in *Doe* v. *Simpson* (*x*), an estate for life, with a superadded term of years, but) an estate in fee-simple. The result, in short, is that trustees, whose estate is not expressly defined by the will, must, in every case, *and whatever be the nature of the duty imposed on them*, take either an estate for life or an estate in fee. It is observable that this section allows the trustees to take an estate of freehold, not whenever the purposes of the trust require such an estate, but only in the specified case of the 'surplus rents and profits being given to a person for life,' making no provision, therefore, for the case (a possible though not a frequently occurring one) of a trust of any other kind being created for a purpose co-extensive with life; for instance, a trust to keep on foot a policy of life insurance. Possibly it would be held that such a case is excluded from the 31st section by the exception in the 30th section, and thus some effect would be given to this otherwise apparently idle clause of the statute; farther than this (even if so far), it is presumed the exceptive part of the 30th section could not be construed to qualify or control the operation of the 31st section, but decision alone can settle the point."

In *Re Dawson's Settled Estates* (*y*) the testator devised real estate to trustees upon trust to permit his widow to receive the rents thereof during her life and after her decease upon trust to pay the same to or for the benefit of such of his two daughters E. and M. as should be then living and should for the time being be single and unmarried in equal shares, if more than one, and when both should be married upon trust as to both capital as well as income for all the testator's children in equal shares. The widow died in 1889, leaving both E. and M. surviving. E. died in 1927. It was held that as the purposes of the trusts of the will were such as might continue beyond the life of the widow the real estate was, at the date of the Law of Property Act, 1925, coming into force, by the effect of section 31 of the Wills Act vested in the surviving trustee of the will in fee-simple, and that paragraph 1 (1) of Part IV of the first schedule to the Act of 1925 applied.

(*u*) 1 P. Wms. 505; 3 Br. P. C. 64. (*x*) 5 East, 162.
(*y*) [1928] 1 Ch. 421; *Re Collins*, [1929] 1 Ch. 201; *Re Barrat*, [1929] 1 Ch. 336.

CHAPTER XLVI.

INCOME TAX, DEATH DUTIES.

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THE subject of income tax and death duties does not fall within the scope of this work, but it is necessary to consider what expressions used in wills will exonerate legatees or devisees from the duty which otherwise they would have to bear.

Income tax on annuities.

I.—Income Tax.—Annuities are subject to income tax (*a*). Where an annuity is payable by the trustees of a will to a beneficiary out of profits or gains chargeable with income tax, the trustees deduct the income tax at the rate in force for the payment of the annuity (*b*). If an annuity is given without any words freeing it from income tax, it is the duty of the trustees to deduct the tax, and if they do not do so they are liable to make good to the trust estate the income tax so overpaid to the annuitants (*c*). But where trustees of a will through an honest mistake have not deducted income tax they are entitled to deduct from future payments the income tax they have overpaid (*d*).

Adjustment when tax in error not deducted.

A contract that an annual payment shall be made without deducting income tax is void (*e*), but this only applies to a

A testator may give an annuity free of tax.

(*a*) Income Tax Act, 1918, s. 1, and Schedule D, and Rules applicable to Case III. This applies to monthly (*Re Cooper*, 119 L. T. 303) and weekly (*Re Jane's Settlement*, [1918] 2 Ch. 54) payments.

(*b*) Income Tax Act, 1918; general Rule 19 applicable to all Schedules. See *Re Cooper's Estate*, 55 Sol. J. 522 (covenant).

(*c*) *Re Sharp*, [1906] 1 Ch. 793; but section 8 of the Trustee Act, 1888, applies.

(*d*) *Re Musgrave*, [1916] 2 Ch. 417; *Re Wooldridge*, [1920] W. N. 78; *Re Ainsworth*, [1915] 2 Ch. 96 (legacy duty). See also *Re Reading*, 60 Sol. J. 655 (over-payment made by trustee). This does not apply to over-payment made by a debtor to a creditor: *Re Hatch*, [1919] 1 Ch. 351; *Ord* v. *Ord*, [1913] 2 K. B. 432.

(*e*) Sections 102, 103 of the Income Tax Act, 1842, now replaced by Rule 23 (2) of the General Rules in the First Schedule to the Income Tax Act, 1918: *Re Gretton's Indenture*, [1923] 1 Ch. 77; *Burroughes* v. *Abbott*, [1922] 1 Ch. 86; *Re Peck's Settlement*, [1921] 2 Ch. 237. See *Re Gordon's Settlement*, [1924] 1 Ch. 146.

contract between payer and payee (*f*), and a testator is at liberty to give an annuity free of income tax. The rule is thus stated by Hall, V.-C., in *Re Bannerman's Estate* (*g*) as follows: "Whether or not an annuity should be free from any deduction for income tax must depend upon the meaning of the words used by the testator, *i.e.*, if upon the construction of the words the Court considered that it was intended by the testator that the annuitant should have the specified annuity without the tax being first deducted, there was no rule of law to prevent effect being given to the intention. The question, therefore, in every case is one of construction of the language of the will."

Repayment to an annuitant of part of tax.

Where a testator gives an annuity free of income tax and the annuitant, under the provisions of the Income Tax Acts, obtains relief by way of repayment of income tax in excess of the amount properly payable by him, the residuary estate of the testator is entitled to such proportion of the sum so repaid as the annuity bears to the total income of the annuitant (*h*).

"Free of all duties."

"Clear."

The Court requires the words to be extremely clear in order to free the annuitant from the tax. Thus the expression "free of all duties" does not, apart from the context, mean free of income tax (*i*). A "clear" annuity is not free of tax (*j*).

"Deductions."

Since income tax has to be deducted, one might suppose that an annuity given clear of deductions was free of income tax. But this is not the result of the authorities (*k*). In *Wall* v. *Wall* (*l*) the words were "clear of all taxes and deductions" yet it was held that the annuity was subject to income tax; in *Lethbridge* v. *Thurlow* (*m*) a rentcharge was given "clear of legacy duty and every other deduction whatsoever"; in *Sadler* v. *Rickards* (*n*) an annuity was given "free from legacy duty and other deductions"; in *Abadam* v. *Abadam* (*o*) a jointure was appointed "to be payable without any deduction whatever"; but in each case it was held that the words did not free the gift from income tax.

(*f*) *Brooke* v. *Price*, [1917] A. C. 115, a peculiar case. See *Re Carr's Settlement*, [1919] 2 Ch. 364; *Murdock's Trustees* v. *Murdock*, [1918] S. C. 738; *Re Viscount Portman*, [1924] 2 Ch. 6 (abated rentcharge).

(*g*) 21 Ch. D. 108.

(*h*) *Re Pettit*, [1922] 2 Ch. 765.

(*i*) *Re Saillard*, [1917] 2 Ch. 401.

(*j*) *Re Loveless*, [1918] 2 Ch. 1; *Gleadow* v. *Leetham*, 22 Ch. D. 274; see also *Peareth* v. *Marriott*, 22 Ch. D. 182.

(*k*) See *per* Warrington, L.J., in *Re Shrewsbury Estate Acts*, [1924] 1 Ch., at pp. 336, 337.

(*l*) 15 Sim. 513.

(*m*) 15 Bea. 334.

(*n*) 4 K. & J. 302.

(*o*) 33 Bea. 475.

Deductions.

But the testator may explain that he means the word "deduction" to include income tax. Thus in *Turner* v. *Mullineux* (*p*), the testator gave three annuities, the first "free from income or property tax or any other deduction," the second, "free from all deductions"; the third "free from deductions." Here the testator had shown that he regarded income tax as a deduction and it was held that all three annuities were free from income tax. In *Re Bannerman's Estate* (*q*), the words "free from all deductions in respect of any present or future taxes, charges, assessments, or impositions or other matter cause or thing, whatsoever" were held to free annuities from income tax. In *Re Shrewsbury Estate Acts* (*r*) (in a private Act) the words "clear of all deductions whatsoever for taxes or otherwise" were held to extend to income tax.

Taxes.

Since income tax is a tax, a direction that an annuity is to be paid free of taxes would *prima facie* seem to be sufficient to free the annuity from income tax. In *Festing* v. *Taylor* (*s*) the words "without any deduction or abatement whatsoever on account of any taxes, charges, impositions or assessments already or to be thereafter taxed, charged, assessed or imposed on the said rentcharge" or on the Duchess to whom the rentcharge was granted "or her assigns in respect thereof, by authority of Parliament or otherwise howsoever" were held to have the effect that income tax was not to be deducted from the rentcharge. So in *Lord Lovat* v. *Duchess of Leeds* (*t*), where the words were "to pay and defray all taxes, Parliamentary, parochial or otherwise, affecting the same hereditaments," and in *Re Bannerman's Estate* (*u*) where the words were "free from all deductions in respect of any present or future taxes, charges, assessments, or impositions, or other matter, cause, or thing, whatsoever."

In *Gleadow* v. *Leethem* (*v*), Kay, J., points out that it is only when the word "deduction" was coupled with the word "taxes" or there was some other indication that it was meant to include income tax that it was so construed.

In Scotland an annuity to be paid out of the "net annual proceeds" of one half of the testator's residuary estate was held to be payable without deduction of income tax (*x*); but a

(*p*) 1 J. & H. 334; *Re Buckle*, [1894] 1 Ch. 286, is another illustration.
(*q*) 21 Ch. D. 105. See also *Festing* v. *Taylor*, 3 B. & S. 217.
(*r*) [1924] 1 Ch. 315.
(*s*) 3 B. & S. 217.
(*t*) 2 Dr. & Sm. 62.
(*u*) 21 Ch. D. 105; *Wall* v. *Wall*, 15 Sim. 513, is cited *ante*, p. 1788; there the words "taxes" and "deductions" were held not to comprise income tax.
(*v*) 22 Ch. D., at p. 269, citing *Lethbridge* v. *Thurlow*, 15 Bea. 334; *Abadam* v. *Abadam*, 33 Bea. 475; and *Sadler* v. *Rickards*, 4 K. & J. 302.
(*x*) *Smith's Trustees* v. *Gaydon*, [1919] S. C. 95.

direction to pay to the testator's wife the free yearly income of the testator's estate up to if possible the sum of £600 per annum was held not to free the £600 per annum from income tax (*y*).

Super-tax.

11.—Super-tax.—Super-tax was first imposed by the Finance (1909-10) Act, 1910, s. 66, where it is called an additional duty of income tax, and this expression is repeated in section 4 of the Income Tax Act, 1918. So that super-tax is an income tax (*z*). It is, however, not charged by way of deduction, and it does not follow that words which exonerate an annuity from income tax, also imply that the beneficiary is to be paid the super-tax, because that is not a charge in respect of the annuity but is a charge in respect of the recipient's whole income.

Does income tax include super-tax?

In *Re Crawshay* (*a*) an annuity was given "free of all deductions including income tax." Peterson, J., held that deductions meant deductions for which the trustees were accountable, but that did not include super-tax which the annuitant must pay himself. In *Re Crosse* (*b*) the testator directed his trustees out of the income of his residuary estate to pay to his wife during her widowhood such a sum as might be requisite to make up together with the income payable to her under her marriage settlement "the clear annual sum of £4,000 a year free from income tax." Astbury, J., held that the wife was entitled to £4,000 a year free from super-tax as well as ordinary income tax. In *Re Doxat* (*c*) an annuity was bequeathed "free of income tax and of all other deductions." Sargant, J., held that super-tax was an additional income tax, and that "all other deductions" did not diminish the force of the previous words. In *Re Bates* (*d*) the testator gave to his wife "such a sum in every year as after deduction of the income tax for the time being payable in respect thereof will leave a clear sum of £2,000." Russell, J., held that the widow was not entitled to the payment of any sum in respect of super-tax.

Free of super-tax.

When the annuity is given free of super-tax and the recipient has other income the annuitant is paid such a proportion as the total super-tax payable by her bears to the total amount of her income assessed for super-tax (*e*).

(*y*) *Wilson's Trustees* v. *Wilson*, [1919] S. C. 359. See *Re Cain's Settlement*, [1919] 2 Ch. 365.

(*z*) *Bowler* v. *Att.-Gen.*, [1911] 1 Ch. 123; *Brook* v. *Inland Revenue Commissioners*, [1918] 1 K. B. 257; *Re Crosse*, [1910] 1 Ch. 240.

(*a*) 60 Sol. J. 275. The testator died before super-tax had been imposed.

(*b*) [1920] 1 Ch. 240. The wife had no property other than the income under her marriage settlement and the will.

(*c*) 64 Sol. J. 651; *Re Bowen*, 70 Sol. J. 44; *Smith's Trustees* v. *Smith*, [1924] S. C. 485. See *Wordie's Trustees* v. *Wordie*, [1922] S. C. 28.

(*d*) [1925] Ch. 157.

(*e*) *Re Bowring*, 62 Sol. J. 729; *Re Doxat*, 64 Sol. J. 651; *Re Bowen*, 70 Sol. J. 44.

In *Re Lord Armaghdale's Will Trusts* (*f*) the testator bequeathed to his wife an annuity of £3,000 free of income tax and super-tax and directed that as regards super-tax no apportionment should be made between the said annuity and the rest of his wife's income, but that the whole of the super-tax payable up to but not exceeding super-tax on £3,500 a year with the income tax thereon added thereto should be attributed to the annuity and be paid by his trustees accordingly. Russell, J., said that the trustees were not to pay the widow more than a super-taxable sum of £3,500 with the income tax of 4s. in the £ added thereto, *i.e.*, £4,200, so that with the existing £2,000 exemption, the trustees were to pay what would be the super-tax payable on a total sum of £6,200.

Super-tax is now called sur-tax (*g*).

III. Estate Duty.—The estate duty in respect of the real estate of the deceased and property appointed by his will is a first charge on such real estate and property (*h*); but the estate duty upon the personal property which the deceased was competent to dispose of at his death (otherwise than by appointment) is payable out of his personal estate as a "testamentary expense" (*i*). Under section 5 of the Finance Act, 1894, where property was settled by a will, a further estate duty, called settlement estate duty, was levied, but during the continuance of the settlement estate duty was not payable more than once. Hence the estate duty was ascertained at the testator's death; but section 14 of the Finance Act, 1914, which abolished settlement estate duty, also abolished the exemption, so that when property is settled in succession by a will, estate duty becomes payable on each devolution. This caused difficult points to arise on words which exonerated settled property from estate duty, and the cases are not always easy to reconcile. The question came before the Court of Appeal in *Re Wedgwood* (*j*) where Lord Sterndale, M.R., said: "I think it is settled that the words "free of all death duties" have no general meaning as applied

S. 14 of the Finance Act, 1914.

Re Wedgwood.

(*f*) [1928] W. N. 26. As to a covenant to pay part of super-tax, see *Fleetwood-Hesketh* v. *Fleetwood-Hesketh*, [1929] 2 K. B. 55.

(*g*) Finance Act, 1927, Part III.

(*h*) Finance Act, 1894, s. 9, sub-s. 1; *O'Grady* v. *Wilmot*, [1916] 2 A. C. 231; *Re Morris*, 71 Sol. J. 472. As to undivided shares in land, see *Att.-Gen.* v. *Public Trustee*, [1929] 2 K. B. 77.

(*i*) Finance Act, 1894, s. 6; *Re Pullen*, [1910] 1 Ch. 564; *Re Lewis*, [1900] 2 Ch. 176; *Re Clemow*, [1900] 2 Ch. 182; *Re Sharman*, [1901] 2 Ch. 280; *Re Jolley*, 17 T. L. R. 244; *Re Spencer Cooper*, [1908] 1 Ch. 130 (distinguishing *Re Trenchard*, [1905] 1 Ch. 82); *Re Avery*, [1913] 1 Ch. 208 (reversionary interest).

(*j*) [1921] 1 Ch. 601; the earlier cases were *Re Parker*, 117 L. T. 422; *Re Palmer*, [1916] 2 Ch. 391; *Re Stoddart*, *ib.* 444; *Re Snape*, [1915] 2 Ch. 179. See also *Re Brown*, 60 Sol. J. 353; *Re Gunn*, [1916] W. N. 283.

to all wills, and that they must be construed according to the meaning given to them by the particular will under consideration. Two meanings were mentioned in argument: (1) "free of all death duties arising in consequence of my death" and (2) "free of all death duties arising in consequence of the dispositions made by my will" (*jj*). In that case it was held that on the death of a tenant for life of a settled legacy, the estate duty would be payable out of the corpus of the settled legacy. Evidently if the construction was otherwise (as in *Re Parker* (*k*)) it may become very difficult to administer the estate, and if the result of one construction is to impose a very heavy burden and one that is difficult of calculation, and the other construction is to result in something workable, then in case of there being nothing to choose between the two the Court would lean towards the second construction rather than the first (*l*).

This principle was applied in *Re Duke of Sutherland* (*m*), and in *Re Sarson* (*n*) when Eve, J., said: "*Prima facie* the testator is to be assumed to have intended to limit his benevolence in this direction to the estate duty payable on his own decease." He pointed out that it was not easy to reconcile *Re Hatch* (*o*), *Re Parker* (*p*), and *Re Eve* (*q*) with *Re Wedgwood* (*r*), *Re Duke of Sutherland* (*s*), and *Re Beecham* (*t*). The inconvenient construction was adopted in *Re Tinkler* (*u*), the convenient one in *Re D'Oyley* (*v*), and *Re Forder* (*w*), where the testator directed that all legacy or government duties should be a charge upon and paid out of his estate and not by any beneficiary thereunder.

Net sum.

When an appointment is made of a net sum clear of all costs and expenses of raising the same the estate duty is thrown on the residuary fund appointed (*x*).

Testamentary expenses.

In *Re Morrison* (*y*) the testator gave a sum "subject to death

(*jj*) Words to this effect were used in *Re Jones*, [1928] W. N. 227.
(*k*) 117 L. T. 422.
(*l*) *Per* Sargant, J., in *Re Fenwick*, [1922] 2 Ch. 775, at p. 781, based on *Re Wedgwood*, *supra*.
(*m*) [1922] 2 Ch. 782.
(*n*) [1925] 1 Ch. 31.
(*o*) 115 L. T. 472.
(*p*) 117 L. T. 422.
(*q*) [1917] 1 Ch. 562.
(*r*) [1921] 1 Ch. 601.
(*s*) [1922] 2 Ch. 782.
(*t*) 110 L. T. 558.
(*u*) [1917] 1 Ch. 242; also in *Dunn's Trustees* v. *Dunn*, [1924] S. C. 613.
(*v*) [1917] 1 Ch. 556; see also *Re Massey*, 122 L. T. 676.
(*w*) 137 L. T. 538.
(*x*) *Re Grant*, 112 L. T. 1126; *Re Coxwell's Trusts*, [1910] 1 Ch. 63 (clear amount or value); *Re Saunders*, [1898] 1 Ch. 17 (succession duty).
(*y*) 102 L. T. 530; *Re Brown*, 60 Sol. J. 353.

duties" and by another clause directed his executors to pay his testamentary expenses. It was held that the estate duty as a testamentary expense was payable out of residue and that any duties properly attributable to the legacy should be borne by the legacy. In *Re Massey* (*z*) a direction to pay all testamentary expenses including death duties was held not to refer to estate duty on realty. In *Re Pinm* (*a*) a direction to pay testamentary expenses and duties out of a particular fund was held to exonerate specifically devised realty from estate duty.

Duties.

In *Re Nesfield* (*b*) the testator devised a messuage "free of any incumbrances"; this was held to free it from estate duty and from succession duty, but as the title deeds were deposited as security may the words not have been merely an expression of a contrary intention within the meaning of Lord King's Acts (*c*)?

"Free of incumbrances."

In *Re Fitzhardinge* (*d*) a jointure was charged on an estate "free from all taxes and deductions except property tax and legacy or succession duty." This was held to be an express provision to the contrary within the meaning of section 14, sub-section 1 of the Finance Act, 1894. So in *Re Cadogan* (*e*) a jointure clear of all charges and outgoings was held to be free from estate duty. As to estate duty on timber sold up to the death of the testator see *Re Leconfield* (*f*) and *Re Scott* (*ff*).

"Free of taxes."

"Free of charges."

Timber.

It may be mentioned that if the tenant for life of a settled legacy dies within a year of the testator's death so that he never became entitled to receive any income in respect thereof, estate duty does not become payable on the legacy on his death (*g*).

Re Northcliffe.

In *Re Northcliffe* (*gg*) the testator disposed of part of the income of his residuary estate amongst certain persons and provided that on the death of any one of them his or her share should accrue to the survivors. It was held that the duty payable on any such death was a first charge on that portion of the residue out of which the income was payable and must be borne out of the *corpus* of the estate.

In *Re Lomer* (*h*) the testator directed that as certain funds should fall in on the deaths of certain tenants for life they should be paid to certain named charities in the order of priority therein

(*z*) The will was made before there was a decision that testamentary expenses included estate duty on personalty.
(*a*) [1904] 2 Ch. 345.
(*b*) 110 L. T. 970.
(*c*) See *post*, p. 1987.
(*d*) 80 L. T. 376.
(*e*) 56 Sol. J. 11.
(*f*) 90 L. T. 399.
(*ff*) [1916] 2 Ch. 268.
(*g*) *Re Harrison*, [1918] 2 Ch. 374.
(*gg*) [1929] 1 Ch. 327.
(*h*) [1929] 1 Ch. 731.

stated. It was held that each successive charity should receive its full legacy (less legacy duty) before the next charity took anything, so that the estate duty would fall on the later charities.

Settlement estate duty.

IV.—Settlement Estate Duty.—A further estate duty called settlement estate duty was imposed on property settled by the will of the deceased by section 5 of the Finance Act, 1894, and was, as we have seen, abolished by section 14 of the Finance Act, 1914.

Under section 19 of the Finance Act, 1896, "the settlement estate duty leviable in respect of a legacy or other personal property settled by the will of the deceased shall (unless the will contains an express provision to the contrary) be payable out of the settled legacy or property, in exoneration of the deceased's estate." A direction to pay "testamentary expenses" out of residue is not a provision to the contrary, because settlement estate duty on personalty is not a testamentary expense (*i*). In *Re Lewis* (*j*) Kekewich, J., held a direction to pay out of another fund "all duties payable by law out of my estate" was not an express provision to the contrary, but where the direction was to pay "the death duties payable out of my estate" out of a specific fund, Swinfen Eady, J. (distinguishing *Re Lewis*), held that the settlement estate duty on chattels settled by the will was payable out of the specific fund (*k*). If a jointure is to be paid "without any deduction whatsoever, except in respect of income tax," this is an express provision to the contrary within section 14, sub-section 1 of the Finance Act, 1894 (*l*); a sum to be paid "without any deduction" is to be paid free of settlement estate duty (*m*).

"All death duties."

In *Re Briggs* (*n*) a direction to pay all death duties was held to refer only to duties to which the testator's estate became liable under the dispositions of his will and not to extend to duties on a charge for £15,000 held by the trustees of his daughter's marriage settlement.

"Clear." "Net."

Where a fund is directed to be set aside sufficient to provide for a "clear" or a "net" annuity this is sufficient to exonerate the fund from settlement estate duty (*p*).

(*i*) *Re King*, [1904] 1 Ch. 363.

(*j*) [1900] 2 Ch. 176.

(*k*) *Re Cayley*, [1904] 2 Ch. 781. See *Re Pimm*, [1904] 2 Ch. 345, and *Re Leveridge*, [1901] 2 Ch. 830 ("estate duty" held to include settlement estate duty).

(*l*) *Re Parker-Jervis*, [1898] 2 Ch. 643 (settlement).

(*m*) *Re Maryon-Wilson*, [1900] 1 Ch. 565 (settlement); *Dundas Trustees* v. *Dundas Trustees*, [1912] S. C. 375.

(*n*) [1914] 2 Ch. 413 (settlement estate duty, succession duty and the apportioned part of the estate duty).

(*p*) *Re Waller*, [1916] 1 Ch. 153; *Re Dyet*, 87 L. T. 744 (clear yearly sum).

"Free from duty."

The words "free from duty" include settlement estate duty (*q*) and the duty like the legacy duty is treated as an additional legacy and added to the settled legacy for the purposes of abatement.

Legacy duty.

V.—Legacy Duty.—If a legacy or annuity is given free of duty, the duty is a pecuniary legacy, and hence this bequest of duty will abate *pari passu* with the general legacies in case of there being a deficiency of assets (*r*). Under section 21 of the Legacy Duty Act, 1796 (*s*), legacy duty is not payable upon the bequest of the duty.

The following expressions have been held to exempt the legatees from the payment of legacy duty. A direction to executors to pay the duty on legacies out of the general estate (*t*); to make payment of all the legacies without any deduction (*u*); or to pay the annuities and legacies clear of property tax and all expenses whatever attending the same (*x*); or free from any charge or liability in respect thereof, although in the same will there was a bequest free from any duty (*y*); or where the legacies were to be paid clear of all taxes and outgoings (*z*), free of all expense (*a*), or "free from duty" (*b*). Where a testatrix gave her real and personal estate upon trust to pay off the debts of her late husband, it was held that the legacy duty was to be borne by the legatee creditors, though it was contended that the testatrix's object would not be completely effected without paying the duty out of the general estate: but Tindal, C.J., observed that the debt had in effect been paid, for at the moment of payment the law casts on the legatee the liability to settle the duty (*c*).

Proceeds of realty.

A direction to pay legacies free of duty will not generally include the proceeds of realty directed to be sold (*d*); but probably would include legacies payable out of such proceeds.

(*q*) *Re Turnbull*, [1905] 1 Ch. 726.

(*r*) *Farrer* v. *St. Catharine's College*, L. R. 16 Eq. 19. See *Wilson* v. *O'Leary*, L. R. 17 Eq. 419; *Re Turnbull*, [1905] 1 Ch. 726. In *Re Wilkins*, 27 Ch. D. 703, one of two annuities was given free of duty. See also *Lord Advocate* v. *Miller's Trustees*, 21 Sco. L. R. 709, and *Re Hadley*, [1909] 1 Ch. 20, at p. 25 (estate duty).

(*s*) 36 Geo. 3, c. 52.

(*t*) *Re Whiteley*, 100 L. T. 920; 101 L. T. 508.

(*u*) *Barksdale* v. *Gilliat*, 1 Sw. 562.

(*x*) *Courtoy* v. *Vincent*, T. & R. 433.

(*y*) *Warbrick* v. *Varley*, 30 Bea. 241.

(*z*) *Louch* v. *Peters*, 1 My. & K. 489.

(*a*) *Gosden* v. *Dotterill*, 1 My. & K. 56.

(*b*) *Re Turnbull*, [1905] 1 Ch. 726; *Re Snape*, [1915] 2 Ch. 179 (the duty was imposed after the death of the testatrix); *Re Waller*, [1916] 1 Ch. 153.

(*c*) *Foster* v. *Ley*, 2 Scott, 438.

(*d*) *White* v. *Lake*, L. R. 6 Eq. 188; *Re King's Trusts*, 29 L. R. Ir. 401. See *Re Morrison*, 26 T. L. R. 395.

"Legacy" and "legatee" may, however, be explained by the context to refer to realty (see *ante*, p. 974).

Specific bequests.

Where the testatrix directed all the legacies to be paid free of legacy duty, it was held that specific legacies of chattels were included in spite of the inaptness of the words "to be paid" (*e*), and the duty payable on the release of a debt (which is a specific legacy) was held to be payable out of the general personal estate under a direction to pay all "pecuniary" legacies free and clear of legacy duty (*f*).

"Clear."

And generally it would seem that, in spite of the cases in the footnote (*g*), a gift of a "clear" sum or annuity involves an exemption from legacy duty (*h*). But a legacy of a "full" amount does not carry exemption from duty if the word "full" refers to other possible deductions (*i*).

"Full."

Legacies given by codicil.

A direction in a will that the legacy duty on the legacies "herein" given shall be paid out of the testator's estate does not extend to legacies given by a codicil, even though the codicil is directed to be taken as part of the will (*k*); it is otherwise where legacies generally are given duty free (*l*).

In *Re Dalrymple* (*m*) the testatrix, after giving certain legacies to males and females, declared that all legacies, devises and bequests thereinbefore or thereinafter given or made to or in favour of females should be free of legacy duty, and gave the residue to three males and three females as tenants in common. Kekewich, J., held that the legacy duty in respect of the shares of the females in the residue was to be paid out of their respective shares.

(*e*) *Re Johnston*, 26 Ch. D. 538.

(*f*) *Morris* v. *Livie*, 11 L. J. Ch. 172.

(*g*) *Hales* v. *Freeman*, 4 J. B. Moo. 21; 1 Br. & B. 391 (question not raised); *Burrows* v. *Cottrell*, 3 Sim. 375 (question not raised); *Sanders* v. *Kiddell*, 7 Sim. 536.

(*h*) *Harper* v. *Morley*, 2 Jur. 653; *Ford* v. *Ruxton*, 1 Coll. 403; *Baily* v. *Boult*, 14 Bea. 595; *Haynes* v. *Haynes*, 3 D. M. & G. 590; *Re Coles' Will*, L. R. 8 Eq. 271; *Marris* v. *Burton*, 11 Sim. 161; *Louch* v. *Peters*, 1 My. & K. 489; *Gude* v. *Mumford*, 2 Y. & C. 445; and see *Hodgworth* v. *Crawley*, 2 Atk. 376; *Re Robins*, 58 L. T. 382 (where another legacy was given "free of legacy duty"); *Re Currie*, 57 L. J. Ch. 743; *Re Saunders*, [1898] 1 Ch. 17 (settlement: succession duty; it is not clear from the report why the question arose as to succession duty and not estate duty); *Re Dyet*, 87 L. T. 744; *Re Coxwell's Trusts*, [1910] 1 Ch. 63.

(*i*) *Re Marcus*, 56 L. J. Ch. 830; *Re Townend*, [1914] W. N. 145.

(*k*) *Early* v. *Benbow*, 2 Coll. 342; and see (as to "herein") *Radburn* v. *Jervis*, 3 Bea. 450; *Fuller* v. *Hooper*, 2 Ves. Sen. 242; *Jauncey* v. *Att.-Gen.*, 3 Giff. 308; *Gillooly* v. *Plunkett*, 9 L. R. Ir. 324; *Re Trinder*, 56 Sol. J. 74 ("this my will"); as to these words see *Re Smith*, [1916] 2 Ch. 368.

(*l*) *Byne* v. *Currey*, 2 Cr. & Mee. 603. See also *Williams* v. *Hughes*, 24 Bea. 474; *Ansley* v. *Cotton*, 16 L. J. Ch. 55, where the question was whether a legacy of stock was free of duty; and *Re Sealy*, 85 L. T. 451 (where *Early* v. *Benbow* and *Byne* v. *Currey* are discussed).

(*m*) 49 W. R. 627.

Similarly, the following expressions have been held to exempt annuitants from the payment of legacy duty: "clear of all deductions whatsoever" (*n*); "without any deduction or abatement out of the same on any account or pretence whatsoever" (*o*); "clear of all taxes and deductions whatsoever" (*p*).

Fund to meet annuities.

A distinction has, indeed, been taken between the simple case of a gift of a clear yearly sum and the case of a direction to trustees to set apart a sum of money sufficient to produce a clear yearly sum where the trust of corpus is for persons in succession (*q*); and it was actually decided in *Pridie* v. *Field* (*r*) that in such a case the word "clear" did not mean free of duty. But this distinction does not seem to be tenable on principle (*s*).

Re Kennedy.

Bequest free of all duties.

In *Re Kennedy* (*t*) the testator declared that all the legacies, annuities and bequests bequeathed by his will should be given and paid free of all death duties; he directed that his trustees should pay his death duties, legacies and annuities out of the proceeds of sale of his residuary estate, and hold the residue upon trust to pay certain annual sums to A and B during the life of C, and subject thereto upon trust for C for life with remainder to A and B. The Court of Appeal held that C's life interest in residue was a bequest bequeathed by the will and that the legacy duty payable in respect thereof was payable out of the corpus of the estate and not out of C's income. But why were not the gifts in remainder to A and B bequests, if the gift to C was a bequest? Lord Cozens-Hardy, M.R., said: "It is no doubt true that in general a gift of residue or of a share of residue free from duty is ineffective, for the duty must be paid out of residue. But it by no means follows from this that where the residue is settled and the duty is payable at different times and at different rates the duty in respect of the life interest cannot by the language of the will be made payable out of capital."

In *Re Tanqueray* (*u*) a gift of a life estate was held not to be a legacy and so free from legacy duty under a direction that all legacies should be free of legacy duty.

(*n*) *Dawkins* v. *Tatham*, 2 Sim. 492 (it was contended that the words excluding deduction referred to the payment of land tax).

(*o*) *Smith* v. *Anderson*, 4 Russ. 352.

(*p*) *Stow* v. *Davenport*, 5 B. & Ad. 359.

(*q*) *Sanders* v. *Kiddell*, 7 Sim. 536; *Marris* v. *Burton*, 11 Sim. 161; *Baily* v. *Boult*, 14 Bea. 595.

(*r*) 19 Bea. 497; see also *Banks* v. *Braithwaite*, 32 L. J. Ch. 35, which was questioned in *Re Saunders*, [1898] 1 Ch. 17.

(*s*) *Wilks* v. *Groom*, 2 Jur. (N.S.) 798; *Harper* v. *Morley*, 2 Jur. 653, which was not cited in *Banks* v. *Braithwaite*.

(*t*) [1917] 1 Ch. 9.

(*u*) [1924] W. N. 142.

VI.—Succession Duty.—Like legacy duty the succession duty is borne by the beneficiaries in respect of their interest at the appropriate rate (*x*). The words "death duties" include succession duty (*y*), as they do estate duty and settlement estate duty (*z*), and the words "free of any incumbrances" have in one case (*a*) been held to free a devise from succession duty. When a man covenanted with trustees to pay a sum "free from all deductions whatever" and his executor paid, it was held that succession duty, if payable, must be borne by the fund (*b*). An appointment of a net sum is free from succession duty (*c*). A direction to pay testamentary expenses including death duties was held not to include succession duty (*d*).

"Free of deduction."

"Net."

Duty wrongly described.

VII.—Miscellaneous Cases.—In *Re Rayer* (*e*), a testator gave certain annuities charged on real estate, and directed that they should be paid "without any deduction except for legacy duty and income tax"; in fact, succession duty and not legacy duty was payable (*f*) : Farwell, J., held that the case was one of *falsa demonstratio*, and that the annuitants had to bear the succession duty.

Re Boxer.

In *Re Boxer* (*g*), by a will made in 1888, the testatrix directed that certain probate duty be raised out of a sum of consols; it was held that this did not operate as a direction to raise the estate duty imposed by the Finance Act, 1894. A direction to pay "all death duties" refers to duties to which a testator's estate became liable under the dispositions of his will and does not include duties which arise in respect of other property on his death such as the duties on a fund settled previously to his death (*h*); but duties on a fund appointed by the will would be included (*i*). In *Re Scott* (*k*) a testator bequeathed free of duty to S. absolutely his valuable collection of works of art in Paris. As to certain of these the Treasury gave a certificate of exemption from duties until they

"All death duties."

Works of art.

(*x*) Succession Duty Act, 1853, s. 42.
(*y*) *Re Hampton*, 62 Sol. J. 585; *Re Nesfield*, 110 L. T. 970.
(*z*) *Re Cayley*, [1904] 2 Ch. 781 ("the death duties payable out of my estate").
(*a*) *Re Nesfield*, 110 L. T. 970, cited above, p. 1793.
(*b*) *Re Higgins*, 31 Ch. D. 142.
(*c*) *Re Saunders*, [1898] 1 Ch. 17.
(*d*) *Re Massey*, 122 L. T. 676.
(*e*) [1903] 1 Ch. 685 (will made before but republished after the Customs and Inland Revenue Act, 1888).
(*f*) See section 21 of the Customs and Inland Revenue Act, 1888.
(*g*) [1910] 2 Ch. 69.
(*h*) *Re Briggs*, [1914] 2 Ch. 413; *Re Pimm*, [1904] 2 Ch. 345; *Re Hartland*, [1911] 1 Ch. 459.
(*i*) *Re Bath's Settlement*, 111 L. T. 153.
(*k*) [1916] 2 Ch. 268; disapproving *Re Lord Swathling*, 29 T. L. R. 88, and distinguishing *Re Leconfield*, 90 L. T. 399.

were sold (*l*). It was held that on a sale S. was liable to pay the estate duty in respect of the exempted chattels and that the legacy duty was payable out of residue. Free of legacy duty does not mean free of French mutation duty (*m*). Local duties in respect of foreign property specifically devised or bequeathed are payable out of that property (*n*).

Foreign duty.

In *Butler* v. *Southam* (*o*) the testatrix devised land in Melbourne to colonial trustees on trust for sale: she gave her residuary estate to English trustees upon trust to sell and thereout to pay her debts. It was held that the colonial duty on the colonial land although deemed to be a debt by colonial law was payable by the colonial trustees and not by the English trustees out of the residuary estate.

Colonial duties.

In *Re Scull* (*p*), a domiciled Englishman bequeathed his American investments to M and appointed him executor so far as related to his American investments. He then devised and bequeathed the residue of his estate to S and appointed him executor so far as related to his estate and effects other than his American investments. It was held that the American investments did not pass to the English executor S as such, and that they therefore were liable to their rateable proportion of the estate duty.

Foreign moveables.

In a Scotch case (*q*) the testator bequeathed a heritage to his two cousins under burden of a bond and disposition in favour of certain other beneficiaries. It was held that the estate duty on the heritage fell to be borne in rateable proportions by the two cousins and the beneficiaries under the bond.

Heritage and bond.

(*l*) Section 20 of the Finance Act, 1896. Section 83 of the Finance Act, 1910.

(*m*) *Re Scott*, [1915] 1 Ch. 592, distinguishing *Peter* v. *Stirling*, 10 Ch. D. 279.

(*n*) *Re Brewster*, [1908] 2 Ch. 365; *Re De Sommery*, [1912] 2 Ch. 622.

(*o*) 99 L. T. 517.

(*p*) 118 L. T. 7

(*q*) *Anderson's Trustees* v. *Matthew*, [1916] S. C. 299.

CHAPTER XLVII.

WHAT WORDS CREATE AN ESTATE TAIL.

	PAGE		PAGE
I. *Words denoting Devise of Estate to Lineal Heirs* ...	1800	III. *Effect of Gift over*	1806
II. *Rule in Archer's Case*	1803	IV. *The New Law*	1812

Proper terms of limiting an estate tail.

I.—Words denoting Devise of Estate to Lineal Heirs.—The rule is thus stated by Mr. Jarman (*a*) : " A limitation to a person and the heirs of his body creates an estate tail general. If it be to him and the heirs *male* or the heirs *female* of his body, he takes an estate tail special, descendible in the male or female line, as the case may be. In the one case the land devolves upon the male issue and (unless the tenure be gavelkind or Borough-English (*b*)) according to the law of primogeniture, in the other upon the females as coparceners. If the estate be general, it will run in this manner through both lines, in their established order of succession.

What informal expressions created an estate tail before 1926.

" But though these are the correct and technical terms of limiting an estate tail, yet such an estate may be created in a will by less formal language; indeed by any expressions denoting an intention to give the devisee an estate of inheritance, descendible to his or some of his *lineal*, but not to his *collateral* heirs, which is the characteristic of an estate tail as distinguished from a fee-simple. The former is transmissible to *lineal* descendants only; the latter in default of lineal devolves to *collateral* and now to ascendant heirs.

Limitation to " heirs male," or " right heirs male, for ever,"

" A devise to A and his heirs male for ever (*c*), or to A and his heirs male living to attain the age of twenty-one (*d*), or to A for life, and after his death to his heirs male, or his right heirs male, for ever (*e*), has been held to confer an estate tail male; the addition of the word ' male,' as a qualification of

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(*a*) First ed., Vol. II, p. 232.

(*b*) See *Trash* v. *Wood*, 4 My. & Cr. 324; *Roe* d. *Aistrop* v. *Aistrop*, 2 W. Bl. 1228; *Anon.*, Dy. 179 *b*, pl. 45. *Re Buckton*, [1907] 2 Ch. 406 (Manor—custom to entail copyholds—gavelkind descent). These tenures are abolished by section 45 of the Administration of Estates Act, 1925.

(*c*) *Baker* v. *Wall*, 1 Ld. Raym. 185; 1 Eq. Ca. Ab. 214, pl. 12, *ante*, p. 1530, n. (*c*). *Re Miller*, [1914] 1 Ch. 511 (heirs male of his body in fee).

(*d*) *Doe* d. *Tremewen* v. *Permewen*, 11 Ad. & Ell. 431.

(*e*) *Lord Ossulston's Case*, 3 Salk. 336; *Doe* d. *Earl of Lindsey* v. *Colyear*, 11 East, 548, and see *Crumpe* v. *Crumpe*, [1900] A. C. 127.

Law before 1926.

—or to heirs by a particular wife.

'heirs,' showing that a class of heirs less extensive than heirs general was intended" (*f*). Of course a devise to A for life with remainder to his right heirs by a particular wife for ever gives A an estate tail special, "heirs by" a particular wife being equivalent to "heirs of the body by" a particular wife (*g*). And in *Idle* v. *Cook* (*h*) it was said that if land were devised to A and his wife for their lives and their heirs and assigns, and for default of such issue over, this would give them an estate tail.

To A and "his heirs lawfully begotten."

"It has even been decided that a devise to one, *et hæredibus suis legitime procreatis*, creates an estate tail (*i*), though the addition merely describes a circumstance which is included in the definition of heir simply, an heir being *ex justis nuptiis procreatus*. Such was the doctrine of the early authorities, and it was recognised and followed in the more recent case of *Nanfan* v. *Legh* (*j*), where a devise to H when he should attain twenty-one, 'and to his heirs *lawfully begotten* for ever,' was held to make the devisee tenant in tail only. In the same will other property was devised to H and his heirs simply, which it was contended afforded an argument in favour of construing the devise in question to give an estate tail; inasmuch as the testator, in varying the phrase, must have had a different intention. Being a case out of Chancery, we are not in possession of the reasons upon which the opinion of the Court was founded; but probably it was considered that the testator, by adding the expression 'lawfully begotten,' intended to engraft *some* qualification on the description of heir, and consequently must have meant an estate tail." In *Good* v. *Good* (*k*), Lord Campbell, C.J., said it was a rule of construction long established and universally recognised, that such words created an estate tail.

To A and his "lawful heirs."

But the words "lawful heirs" standing alone will not be construed heirs of the body (*l*). And if the devise is to a bastard and his heirs, this gives him a fee simple, and not an estate tail, although he cannot have any heirs except heirs of his body (*m*).

(*f*) The line of descent of lands cannot be qualified, except through the medium of an entail, Co. Lit. 27 *b*.

(*g*) *Wright* v. *Vernon*, 2 Drew. 439; 7 H. L. C. 35, and see *Pelham Clinton* v. *Newcastle*, [1903] A. C. 111, and *Magee* v. *Martin*, [1902] 1 Ir. R. 367; *Re Eliot*, [1916] 1 Ir. R. 30 (A and the heirs of his body other than his eldest son).

(*h*) 1 P. W. 70.

(*i*) *Church* v. *Wyat*, Moore, 637; Co. Lit. 20 *b*; Harg. n. 2.

(*j*) 2 Marsh. 107; 7 Taunt. 85.

(*k*) 7 Ell. & Bl. 295.

(*l*) *Mathews* v. *Gardiner*, 17 Bea. 254; *Simpson* v. *Ashworth*, 6 Bea. 412; and see *Stratford* v. *Powell*, 1 Ba. & Be. 1; but see *per* Bushe, C.J., in *Moffet* v. *Catherwood*, Alc. & Nap., at p. 472.

(*m*) *Idle* v. *Cook*, 1 P. W., at p. 78.

CHAP. XLVII.

Law before 1926.

"Heirs to the third generation."

A devise to A, with a direction that neither he nor his heirs to the third generation should mortgage or sell the devised property, will, it seems, create an estate tail (*n*).

To several and their heirs "successively."

And a devise "to the first and other sons of A successively according to priority of birth and their respective heirs for ever," gives the sons successive estates in tail, as the only way of satisfying the intention that they should take in succession (*o*). The same rule applies to a devise to the sons or children of A "in succession," or "in priority" without words of limitation, where the will is since the Wills Act (*p*).

"Descend in the male line."

In *Jenkins* v. *Hughes* (*q*), an intention to create an estate in tail male was shown by a general direction that the testator's estates should always descend in the male line, coupled with various limitations which could hardly be carried into effect except by adopting that construction.

In *Re Score* (*r*), after a devise to his two sons for life, the testator proceeded: "If my sons marry, and have issue, I give to each of their heirs their father's share, and to their heirs for ever; if there is no male issue with either of my two sons, and there is female issue, then the father's share shall be divided between them, share and share alike, as tenants in common, and to their heirs for ever. Should either of my sons die without issue, then such son's share shall go to my other son, and to his heirs for ever." Kay, J., held, applying the rule in *Shelley's Case* (*s*), that the sons took estates in tail male.

Devise to A and his issue, etc.

A devise to A *et semini suo* (*t*) or to A and his issue, clearly creates an estate tail, as is shown more at large in a subsequent chapter (*u*). A devise to A and his offspring (*v*), and a devise to A and his family according to seniority (*w*), and to A and her descendants (*x*), have also been held to create an estate tail general.

Devise to A and his children.

The cases in which a devise to A and his children gave A an estate tail, are discussed in Chapter L, *post*, p. 1876.

(*n*) *Mortimer* v. *Hartley*, 6 Ex. 47; 3 De G. & S. 316; but see *S. C.*, 6 C. B. 819, *contra*.

(*o*) *Lewis v. Waters*, 6 East, 336; *Henness y* v. *Bray*, 33 Bea. 96, and other cases cited *post*, p. 1924.

(*p*) *Studdert* v. *Von Steiglitz*, 23 L. R. Ir. 564; *Re Pennefather* (*Savile* v. *Savile*), [1896] 1 Ir. R. 249. But a different construction has been placed on a devise "to A. and to his children in succession": *Tyrone* v. *Waterford*, 1 D. F. & J. 613; *post*, p 1871.

(*q*) 8 H. L. C. 571.

(*r*) 57 L. T. 40.

(*s*) See Chap. XLVIII.

(*t*) Co. Lit. 9 *b*.

(*u*) Chap. LI.

(*v*) *Young* v. *Davies*, 2 Dr. & Sm. 167.

(*w*) *Lucas* v. *Goldsmid*, 29 Bea. 657. "To A. and his family" simply, gives a fee simple: *Atkyns* v. *Wright*, 17 Ves., at p. 261.

(*x*) *Re Sleeman*, [1929] W. N. 16.

Law before 1926.

Clause of forfeiture.

An intention to create an estate tail may appear from a clause of forfeiture; as in *Crumpe* v. *Crumpe* (*xx*), where a testator gave the rents of his estate to S., but if he encumbered them the testator revoked the gift "from the said S. and from his heirs male"; it was held that S. took an estate tail.

To heir of the body in the singular.

Mr. Jarman continues (*y*): "It is clear that the words *heir* of the body (in the singular) operate as words of limitation, and consequently confer an estate tail. Thus, it has been held that under a devise to A for life, and after his decease to the heir of his body for ever, A is tenant in tail (*z*); and a devise to A and such heir of her body as shall be living at her decease (*a*), [or to A and his heir male living to attain twenty-one, and for want of such issue male the inheritance to go over (*b*),] has received the same construction.

Limitation to next or first heir male.

"Nor is the effect varied by the word *next* or *first* being prefixed to 'heir.' Thus, in *Burley's Case* (*c*), a devise to A for life, remainder to the *next* heir male; for default of such male heir, then to remain, was adjudged to give an estate tail male to A. So, where (*d*) the devise was to M. and his wife for their lives, remainder to the *next* heir male of their two bodies, it was held that M. and his wife were tenants in tail male. Again, a devise to A for life, and after his death to the *first* heir male of his body, remainder over, has been adjudged to create an estate tail male (*e*)."

To "next heir male," with superadded words of limitation.

II.—Rule in Archer's Case.—"But though a devise to the *next* heir male simply, following a devise to the ancestor for life, does not," as Mr. Jarman points out (*f*), "confer on the heir an estate by purchase (the words being construed as words of limitation), yet if the testator has engrafted words of limitation on the devise to the next heir male, he is considered as indicating an intention to use the term 'heir' as a mere

(*xx*) [1899] 1 Ir. R. 359; [1900] A. C. 127. The construction was aided by the name and arms clause and the gift over, but the revocation clause was sufficient; a man cannot revoke what he has not given. In *Vandeleur* v. *Sloane*, [1919] 1 Ir. R. 116, in a limitation to N and her heirs male "she and they and her husband taking the name and bearing the arms of N," it was held that these words formed no portion of the limitation of the estate tail.

(*y*) First ed., Vol. II, p. 233.

(*z*) *Pawsey* v. *Lowdall*, Sty. 249, 273. See also *Whiting* v. *Wilkins*, 1 Bulst. 219; 1 Roll. Ab. 836; *Clerk* alias *Cheek* v. *Day*, Cro. Eliz. 313; *White* v. *Collins*, 1 Com. Rep. 289.

(*a*) *Richards* v. *Bergavenny*, 2 Vern. 324.

(*b*) *Doe* d. *Tremewen* v. *Permewen*, 11 Ad. & Ell. 431; 3 Per. & D. 303.

(*c*) Cited 1 Vent. 230.

(*d*) *Miller* v. *Seagrave*, Rob. Gavelk. 122; 16 Vin. Ab. Parols (H), pl. 4, n.; and see 1 Ves. sen., at p. 337.

(*e*) *Dubber* d. *Trollope* v. *Trollope*, Amb. 453; Lee t. Hardw. 160; and see *Goodright* v. *Pullyn*, 2 Ld. Ray. 1437; 2 Stra. 729; *O'Keefe* v. *Jones*, 13 Ves. 413.

(*f*) First ed., Vol. II, p. 234.

descriptio personæ; in other words, as descriptive merely of the individual who fills the character of heir male at the ancestor's decease; the superadded words of limitation having the effect of converting the expression 'next heir male' into words of purchase, an effect, however, which (as will be shown at large in the sequel) does not, in general, belong to such superadded expressions of this nature. This rule of construction is founded on the authority of *Archer's Case* (*g*), where lands were devised to A for life, and after to the next heir male and the heirs male of the body of such next heir male, and it was unanimously agreed by the Court that this was a contingent remainder to the heir, and that A was but tenant for life, and he having made a feoffment of the devised lands, it was held that such contingent remainder was destroyed.

Archer's Case.

"But it should seem that this construction is not peculiar to such a case as Archer's; namely, where the word 'next' is prefixed, and words of limitation are superadded to 'heir male'; for a similar construction was adopted in a recent case (*Willis* v. *Hiscox*) (*h*), where the former circumstance was wanting. The devise was upon trust for the testator's son, W., for life, and after his decease for the heir male of his body begotten on an European woman, and the heirs of such heir male, and in case the son should die without leaving such heir male of his body, the trustees were to pay the rents equally between the testator's daughters, M. and A., for their lives, and the whole to the survivor; and after the decease of the survivor upon trust for the heir male of the body of M. and the heirs of such heir male, and in default of such heir male of her body, upon trust for the *heir male of the body of A. and the heirs of such heir male.* W. and M. both died without issue; after which A., conceiving herself to be tenant in tail, suffered a recovery. A bill was filed by the heir male of the body of A. to compel a conveyance from the trustee; and Lord Cottenham considered his title so clear that he not only decided in his favour, but compelled the defendant trustee to pay the costs (*i*) of the suit which was occasioned by his refusal to convey without

"To heir male of the body," and his heirs.

(*g*) 1 Rep. 66.

(*h*) 4 My. & Cr. 197.

(*i*) "This seems rather hard upon the trustee, as there was no authority directly in point, and the cases which had decided that a devise to the heir of the body (in the singular) of the devisee for life, without words of limitation engrafted thereon, operated to confer an estate tail (*ante*, p. 1803), and also that superadded words of limitation had no effect in turning heirs male, in the plural, into words of purchase, afforded an argument in favour of the construction which the Court rejected, sufficiently plausible, one should have thought, to justify the trustee's refusal to convey without judicial sanction. The tendency of such decisions is to increase the reluctance, which is now very commonly felt by cautious and well-informed persons, to undertake trusteeships." (Note by Mr. Jarman.)

Law before 1926.

the direction of the Court. His Lordship said, 'The mother has an estate expressly for life; and after her death the devise is to the heir male of her body, in the singular number, with words of limitation to the heirs general of such heir, which, it is clearly settled, gives an estate for life only to the parent, and the inheritance, by purchase, to the heir of the body, as was decided in *Archer's Case* (*k*), and assumed by Hale in *King* v. *Melling* (*l*), and subsequent cases. If, indeed, that proposition were doubtful as a general rule, all doubt would have been removed in the present case; for the words of the limitation are the same as those used in the prior devise to the testator's son; and the particular description of the heir of that son proves that he must have taken by purchase.' "

Words required by rule in *Archer's Case.*

To have this effect, however, the superadded words must be distinct words of inheritance. For, as we have seen, a devise to A for life, remainder to the heir of his body for ever, makes A tenant in tail; the words "for ever," though capable of creating a fee, being insufficient to show that the heir was intended to be a new *stirps* (*m*). In *Re Hussey and Green's Contract* (*n*), it was held that the word "absolutely" did not have the same effect as the words "for ever"; so that under a devise to W. for life and afterwards for his heir-at-law absolutely, the heir-at-law took by purchase under the rule in *Archer's Case.* This is a fine distinction.

"Absolutely."

But it is not necessary, as sometimes contended, that the superadded words should change the course of descent. This appears from *Archer's Case* itself, and was expressly so decided by Sir R. Kindersley, V.-C. (*o*). Nor is it necessary that the first estate should be expressly an estate for life: a devise "to A and the heir male of his body, and the heirs and assigns of such heir male," gives A an estate for life merely, with a contingent remainder in fee to his heir male (*p*).

"To heir male of the body for life."

Again, a devise to A for life, and after his death "to the heir male of his body lawfully begotten, *during his life*," gives A an estate for life, with remainder for life to the person who at his death happens to be his heir male (*q*).

(*k*) 1 Rep. 66.

(*l*) 1 Vent. 225; and see Fearne, C. R. p. 148.

(*m*) *Pawsey* v. *Lowdall*, Sty. 249, 273, stated above; *Silcocks* v. *Silcocks*, [1916] 2 Ch. 161. See also *Fuller* v. *Chamier*, L. R. 2 Eq. 682; 35 L. J. Ch. 772; the latter report supplies the material information that the devisees for life were treated as joint tenants notwithstanding the words "equal shares"; so that the entire property was in the sole survivor.

(*n*) [1921] 1 Ch. 566.

(*o*) *Greaves* v. *Simpson*, 33 L. J. Ch. 641.

(*p*) *Chamberlayne* v. *Chamberlayne*, 6 Ell. & Bl. 625.

(*q*) *White* v. *Collins*, 1 Com. Rep. 289. See *Pedder* v. *Hunt*, 18 Q. B. D. pp. 565, 572.

III.—Effect of Gift over.—The terms of a gift over may have the effect of showing that the testator meant the prior gift to confer an estate tail, and not an estate in fee simple.

Meaning of prior gift explained by gift over.

Accordingly, as Mr. Jarman points out (*r*), "where a testator, in the first instance, devises lands to a person and his heirs, and then proceeds to devise over the property in terms which show that he used the word 'heirs,' in the prior devise, in the restricted sense of heirs of the body; such devise, of course, confers only an estate tail, the effect being the same as if the latter expression had been originally employed. Thus, if lands are devised to A and his heirs, and if he shall die without heirs of his body, or without heirs male of his body, or without an heir or an heir male of his body, then over to another, such devise vests in the devisee an estate tail general, or an estate tail male, as the case may be (*s*).

"Indeed, so well has this been settled from an early period, that, to found an argument in favour of a contrary construction, recourse is always had to special circumstances.

"Thus, where (*t*) a testator devised lands to his wife for life, and after her death to J. his eldest son and his heirs, upon condition that J., as soon as the land should come unto him in possession, should grant to S., testator's second son, and his heirs, an annual rent of £4, and that *if J. should die without heirs of his body*, the land should remain to S. and the heirs of his body; it was contended that the intent was shown that J. should have a fee, otherwise he could not legally grant such a rent, to have continuance after his death: but it was resolved to be an estate tail; for being limited that if he died without issue then it should be to S. and his heirs of his body, *showed what heirs of J. were intended, viz. heirs of his body*; and though he was to make a grant of the rent, yet this, being by appointment of the donor, was not *contra formam donationis*, but stood with the gift, and it should bind the issue in tail. The Court evidently considered the direction to grant the fee

(*r*) First ed., Vol. II, p. 236.

(*s*) *Tracie* v. *Glover*, cit. 3 Leon. 130, pl. 183, Godb. 16; and see *Blaxton* v. *Stone*, 3 Mod. 123; *Denn* v. *Slater*, 5 T. R. 335; *Dansey* v. *Griffiths*, 4 Mau. & S. 61; *Tenny* v. *Agar*, 12 East, 252; *Romilly* v. *James*, 6 Taunt. 263. The rule is also applicable to deeds, Co. Lit. 21 *a*. In *Cane* v. *James*, cit. Skinn. 19, where the devise was to A and his heirs, and if A die without heirs of his body that his sister should have £600, it was held that A took the fee. It will be observed that there was no devise over of the land itself. But if the dying without heirs male or without issue be coupled with any other contingency, as "dying without heirs male in the lifetime of A.," the first devisee takes not an estate tail, but an estate in fee, with an executory devise over: *Pells* v. *Brown*, Cro. Jac. 590; *Eastman* v. *Baker*, 1 Taunt. 174; *Denn* v. *Kemeys*, 9 East, 366; *Doe* v. *Chaffey*, 16 M. & Wels. 656, *ante*, p. 1537.

(*t*) *Dutton* v. *Engram*, Cro. Jac. 427.

farm as conferring *a power*, or rather, perhaps, a trust coupled with a power, in which view it was consistent with an estate tail."

Default of a child,

So, in *Doe* d. *Jearrad* v. *Bannister* (*u*), the testator gave land to S. and her heirs, "if she has any child; if not, then after the decease of herself and her husband, I give it to M." : it was held that S. took an estate tail.

—or son.

The same principle of construction has been applied where the devise over is in default of a son (*x*).

Devise controlled by subsequent clause showing an estate tail to be intended.

In *Biddulph* v. *Lees* (*y*), a devise to A for life, and to his sons in tail male successively, and for default of such issue to B and C and their sons in like manner; and for default of such issue to the daughters of A and their heirs for ever as tenants in common, and for default of such issue to the daughters of B and C in like manner (which it was admitted by the Court would *per se* have given an estate in fee simple to the daughters of A) was held to create an estate tail in the daughters of A, on the ground that the testator had expressly interpreted his meaning by a shifting clause which provided that if any daughter became a nun, the use declared in her favour should cease, and that "the person next in reversion to take according to the aforesaid limitation should, immediately thereupon, enter upon and enjoy the premises as he would have been entitled to hold and enjoy the same in case the person so entering into religion had been then dead without issue of her body."

But an estate in fee simple is not cut down to an estate tail by ambiguous words. Thus, where a testator by his will had devised an estate in fee simple in remainder to A, and by a codicil added a proviso that it should not be lawful for A during his life to suffer any recovery or enter into any deed, matter or thing whatsoever, whereby to cut off, dock, or destroy the entail of his said freehold lands, it was held that the effect of the codicil was not to cut down A's estate to an estate tail (*z*).

Default of issue.

In discussing the effect of the words "in default of issue," or words to that effect, Mr. Jarman remarks (*a*), that the expression "stands pre-eminent for the number and variety of the questions of construction to which it has given rise. The offices assigned to it are very numerous, and vary of course with the context. Following a devise to heirs *general*, a clause of this nature, we have seen, frequently explains the words 'heirs' to mean heirs

(*u*) 7 M. & W. 292.
(*x*) *Post*, p. 1877.
(*y*) Ell. Bl. and Ell. 289.
(*z*) *Van Grutten* v. *Foxwell*, [1897] A. C. 658.
(*a*) First ed., Vol. II, p. 361.

special, *i.e.*, heirs of the body, and cuts down the estate comprised in the prior devise to an estate tail (*b*), unless there is ground for restraining the term 'issue' to issue living *at the death*. Preceded by a devise indefinitely or expressly for life to the person whose issue is referred to, the words in question (occurring in a will which is subject to the old law) have the effect of enlarging such prior devise to an estate tail (*c*), unless they are restrained as before suggested, or *unless there is an intermediate devise to some class or denomination of issue to which they can be referred.*"

The first doctrine referred to by Mr. Jarman—namely, that a devise to A and his heirs, followed by a limitation over in case of his dying without issue, gives A an estate tail, unless "issue" means issue living at his death—has lost its practical importance, by reason of the rule of construction introduced by section 29 of the Wills Act (*d*).

The second doctrine referred to by Mr. Jarman is still sometimes of importance, in cases where the devise over is capable of a referential construction. This subject is discussed in Chap. LII, where the authorities are referred to.

The doctrine did not apply, even before the Wills Act, in cases where the gift over imported a failure of issue at a period not too remote, for then the prior devisee took an estate in fee, subject to an executory devise over (*e*). And the same rule applies to cases within the Wills Act (*f*).

Devise over on failure of heirs to a person in line of descent creates estate tail.

"And here it should be observed," says Mr. Jarman (*g*), "that where real estate is devised over, in default of *heirs* of the first devisee, and the ulterior devisee stands related to the prior devisee so as to be in the course of descent from him, whether in the lineal or collateral line and however remote, as the prior devisee in that case could not die without heirs, while the devisee over exists, the word 'heirs' is construed to mean heirs *of the body*, and accordingly the estate of the first devisee, by the effect of the devise over, is restricted to an estate tail,

(*b*) *Idle* v. *Cook*, 1 P. W. 70; *Walter* v. *Drew*, Com. 372; *Browne* v. *Jerves*, Cro. Jac. 290; *Chadock* v. *Cowley*, *ib.* 695; *Doe* d. *Neville* v. *Rivers*, 7 T. R. 276; *Doe* d. *Ellis* v. *Ellis*, 9 East, 382; *Doe* v. *Ewart*, 7 A. & E. 636; *Biddulph* v. *Lees*, Ell. Bl. & Ell. 289; *Bowen* v. *Lewis*, 9 A. C. 890; *Bamford* v. *Chadwick*, 2 W. R. 531; *Crumpe* v. *Crumpe*, [1900] A. C. 127; and see *ante*, p. 1318.

(*c*) *Ante*, p. 633.

(*d*) *Post*, p. 1915, where the effect of the section is discussed.

(*e*) *Doe* v. *Frost*, 3 B. & Ald. 546; *Ex p. Davies*, 2 Sim. (N.S.) 114; *Parker* v. *Birks*, 1 K. & J. 156; *Blinston* v. *Warburton*, 2 K. & J. 400; *M'Enally* v. *Wetherall*, 15 Ir. C. L. 502; *Coltsmann* v. *Coltsmann*, L. R. 3 H. L. 121; *Gwynne* v. *Berry*, Ir. R. 9 C. L. 494.

(*f*) *Ante*, p. 633.

(*g*) First ed. Vol. II, p. 238.

and the estate of the devisee over becomes a remainder expectant on that estate (*h*). This construction is induced by the evident absurdity of supposing the testator to mean that his devise over should depend on an event which cannot happen without involving the extinction of its immediate object."

The rule extends not only to the case where the person to whom the limitation over is made is capable of being collateral heir to the first devisee, but also to any case where "the event on which the gift over is made necessarily depends on the existence of a collateral heir of the first devisee on such first devisee's death." Thus, in *Re Waugh* (*i*), a testator gave his two cottages, Nos. 9 and 12, Chapel Street, to his daughter C. G. for life, "after her death No. 12 to go to her youngest daughter E. G. and her heirs, and No. 9 to go to her son W. G. and his heirs, if either the said E. G. or W. G. should die without an heir their share is to go to the survivor's heir or heirs." E. G. died in 1891 a spinster; W. G. died in 1897 a bachelor; C. G. died in 1902. Farwell, J., held that E. G. and W. G. took estates tail in the cottages devised to them respectively.

Re Waugh.

In *Fay* v. *Fay* (*k*), land was devised to descend to the heirs of J. and T. for ever, but in the event of both dying without issue, then over; it was held that J. and T. took estates tail with cross remainders between them.

(*h*) 1 Roll. Ab. 836; *Tilly* v. *Collier*, 2 Lev. 162; *Webb* v. *Hearing*, Cro. Jac. 415; *Allen* v. *Spendlove*, 1 Freem, 74; 2 Eq. Cas. Abr. 305, pl. 2; *Parker* v. *Thacker*, 3 Lev. 70; *Law* v. *Davis*, 2 Stra. 849; *Pickering* v. *Towers*, Amb. 363; *Bodens* v. *Lord Galway*, 2 Ed. 297; *Tyte* v. *Willis*, Cas. t. Talb. 1; *Preston* v. *Funnell*, Willes, 164; *Goodright* v. *Goodridge*, Willes, 369; *Nottingham* v. *Jennings*, 1 P. W. 23; *Goodright* v. *Dunham*, Dougl., at p. 266; *Morgan* v. *Griffiths*, Cowp. 234; *Comberbach* v. *Perryn*, 3 T. R. 484, at p. 491; *Ives* v. *Legge*, 3 T. R. 488. *n.*; *Nanfan* v. *Legh*, 2 Marsh. 107; *Doe* d. *Hatch* v. *Bluck*, 6 Taunt. 485; *Simpson* v. *Ashworth*, 6 Bea. 412; Fearne, C.R., 466, citing *Doe* v. *Bluck*. A few early decisions to the contrary, such as *Hearn* v. *Allen*, Cro. Car. 57, are overruled by the current of authorities. *Doe* d. *Littledale* v. *Smeddle*, 2 B. & Ald. 126; *Wall* v. *Wright*, 1 Dr. & Wal. 1, and *Re Smith's Estate*, 27 L. R. Ir. 121, are cases on deeds.

The statement of the rule by Mr. Jarman above quoted has not been dissented from. It is similar to the statement in Hawkins on Wills, p. 177: "If real estate be devised to B. on failure of heirs of A., and B. is capable of being heir to A. the word 'heirs' is construed to mean heirs of the body for otherwise the devise to B. could never come into operation," and in many of the cases above cited the rule is stated in similar terms; but it is submitted that the correct statement of the rule is that given in Fearne on Contingent Remainders (10th ed.), vol. i, p. 466: "But we are to remember, however, that although a devise over after a dying without heirs is in general void, yet this rule is not without exceptions; for if the person to whom the limitation over is made, be a relation of and capable of being collateral heir to the first devisee, in that case the first devisee takes only an estate tail." In the case of a devise to A and his heirs and on failure of his heirs then to B a lineal descendant of A there would, it is submitted, be no ground for giving an estate tail to A. The point does not appear to have been decided.

(*i*) [1903] 1 Ch. 744.

(*k*) 5 L. R. Ir. 274.

In *Re Thomas* (*l*), a farm was devised to W. and, at his death without an heir, to A. and his heirs. Eve, J., held that W. took an estate in fee subject to an executory devise over on his death if he should die without an heir of his body.

Otherwise where to a stranger in blood.

Mr. Jarman continues (*m*): "But the Courts will not so construe the word heirs where the devise over is to a stranger, however plausible may be the conjecture that it was so intended, and consequently the devise over is void for remoteness (*n*); and formerly a relation of the half-blood, or a parent or grandparent was, for this purpose, considered as a stranger, such persons being then excluded from taking by descent (*o*); but the law, at least as to persons dying since the 31st of December, 1833, is now regulated by the statute 3 and 4 W. 4, c. 106, which has admitted relations of the half-blood, and parents and other ancestral relations in the ascending line, to the heirship" (*p*).

To several, one of whom is a stranger in blood.

In *Harris* v. *Davis* (*q*), the gift over in default of heirs of the first devisee was to several other persons, one of whom was not related to the first devisee, but as all the others were related to him, he was held to take an estate tail. It would seem, therefore, sufficient to give the first devisee an estate tail that any one of a number of devisees over was related to him.

As to limitation over to the right heirs of the devisee.

Mr. Jarman continues (*r*): "Of course the limiting of the estate over, in default of heirs of the body or issue, to the right heirs of the devisee, does not vary the construction farther than to give the devisee the remainder in fee expectant on the estate tail. Thus, where (*s*) a testator devised certain lands unto his son P. and his heirs for ever, on condition that he paid W. £30 within one year after the death of the testator's wife, and he gave other tenements to other sons, adding the following clause: —'Item. My will and mind is, that in case any of my said children unto whom I have bequeathed any of my real or copyhold estates *shall die without issue*, then I give the estate of him or her so dying unto his or their *right heirs* for ever'; and it was held that the children took estates tail, with remainder in fee to themselves."

(*l*) [1920] 1 Ch. 515.

(*m*) First ed., Vol. II, p. 238.

(*n*) *Grumble* v. *Jones*, 2 Eq. Ca. Ab. 300, pl. 15; 11 Mod. 207; Willes, 166, *n.*; 1 Salk. 238 *nom. Aumble* v. *Jones; Att.-Gen.* v. *Gill*, 2 P. W. 369; *Griffiths* v. *Grieve*, 1 J. & W. 31.

(*o*) *Tilburgh* v. *Barbut*, 1 Ves. sen. 89; 3 Atk. 617; and see *Preston* d. *Eagle* v. *Funnell*, Willes, 164; *Moffet* v. *Catherwood*, Alc. & Nap. 472.

(*p*) See 1 Hayes's Introd. (5th ed.), p. 319.

(*q*) 1 Coll. 416.

(*r*) First ed., Vol. II, p. 239.

(*s*) *Brice* v. *Smith*, Willes, 1.

"Heirs" in gift over construed by reference to original gift.

In *Simpson* v. *Ashworth* (*t*), the testator devised land to each of his daughters "and her lawful heirs," with a gift over, in case any of them died without lawful heirs, "to my other children that have lawful heirs;" it was held, in accordance with the rule above stated (*u*), that each daughter took an estate tail under the original devise, and that in the gift over the testator "meant the same quantity of estate to go over which he had given in the first instance;" in other words, an estate tail. But in *Re Waugh* (*x*), where the gift over was "to the survivor's heir or heirs," Farwell, J., held that it was a gift to the heirs general of the survivor.

Estate tail general cut down to an estate tail special by implication.

"Sometimes," as Mr. Jarman points out (*y*), "an estate tail general is cut down to an estate tail special by implication. As where (*z*) the devise was to the use of the testator's eldest son John and his heirs for ever, and failing issue of John, to the use of James the second son and his heirs for ever, and failing issue of that son, to the use of the third son George and his heirs for ever, and failing his issue, to the use of every other son the testator should or might have, according to priority of birth; *and failing his* (*testator's*) *issue male*, then to his issue female and their heirs for ever, and for want of issue female, then to the use of his (the testator's) heirs for ever: it was argued that the testator evidently intended to postpone the female to the male line of issue, and that the latter part of the will was explanatory of the devise to the sons, showing that they were to take estates tail male only; for that the intent of postponing the issue female could not be answered without postponing his granddaughters as well as daughters, who were both comprehended under the general expression of his issue female; and of this opinion appears to have been the House of Lords, confirming a decree of the Irish Court of Exchequer" (*a*).

(*t*) 6 Bea. 412.

(*u*) *Ante*, p. 1808.

(*x*) [1903] 1 Ch. 744, *ante*, p. 1809.

(*y*) First ed., Vol. II, p. 239.

(*z*) *Fitzgerald* v. *Leslie*, 3 B. P. C. Toml. 154. This seems to be the converse of *Tuck* v. *Frencham*, Moore, 13, pl. 50; 1 And. 8, and *Doe* d. *Hanson* v. *Fyldes*, Cowp. 833, stated Vol. I, p. 580.

(*a*) But there would be obvious difficulty in working out the case on this principle; for *pari ratione* the daughters should have taken estates tail female. The case is mentioned doubtingly by Lord St. Leonards, 4 H. L. C., at p. 280.

"This chapter, it is obvious, does not exhaust the general subject of which it professes to treat. The numerous instances in which the words *heirs of the body*, accompanied by explanatory expressions, and the words *children*, *son*, and *issue*, have operated to confer an estate tail, are fully discussed in subsequent chapters, to which, therefore, the reader is referred." (Note by Mr. Jarman.)

The new law.

IV.—The New Law.—The new legislation has made considerable alterations in the law relating to estates tail. In the first place all estates tail (or entailed interests as they are now called) are equitable; secondly, every species of property may be entailed; thirdly, entailed interests can only be created by formal words; fourthly, the rule in *Shelley's Case* is abolished; and fifthly, entailed interests in possession can be disposed of by will as they could have been by a disentailing assurance. There are also a few minor alterations in the law of entail.

That estates tail are equitable follows from the fact that after 1925 the only legal estates which can subsist in land are the fee simple and the term of years absolute (*b*).

After 1925 personalty may be entailed.

The power to entail every species of property is given by section 130, sub-section 1 of the Law of Property Act, 1925, which provides that an interest in tail, or in tail male, or in tail female, or in tail special (in this Act referred to as "entailed interest") may be created by way of trust in any property real or personal, but only by the like expression as those by which before the commencement of the Act a similar estate tail could have been created by deed (not being an executory instrument) in freehold land and with the like results, including the right to bar the entail either absolutely or so as to create an interest equivalent to a base fee.

Formal words are necessary to create estates tail after 1925.

S. 130 of L. of P. Act, 1925.

It is thus seen that formal words are generally requisite. Sub-section 2 of section 130 deals with the effect of informal words such as a devise to A and his issue, which previously to 1926 would have created an estate tail in realty. The sub-section runs as follows: "(2) Expressions contained in an instrument coming into operation after the commencement of this Act, which, in a will, or executory instrument coming into operation before such commencement, would have created an entailed interest in freehold land, but would not have been effectual for that purpose in a deed not being an executory instrument, shall (save as provided by the next succeeding section) operate in equity, in regard to property real and personal, to create absolute, fee simple or other interests corresponding to those which, if the property affected had been personal estate, would have been created therein by similar expressions before the commencement of this Act."

Abolition of the rule in *Shelley's Case*.

S. 131 of L. of P. Act, 1925.

The "next succeeding section," referred to above in the words in brackets, abolishes the famous rule in *Shelley's Case*. The section runs as follows: "131. Where by any instrument coming into operation after the commencement of this Act an interest in any property is expressed to be given to the heir or heirs

(*b*) Law of Property Act, 1925, s. 1.

or issue or any particular heir or any class of the heirs or issue of any person in words which, but for this section would, under the rule of law known as the Rule in *Shelley's Case*, have operated to give to that person an interest in fee simple or an entailed interest, such words shall operate in equity as words of purchase and not of limitation, and shall be construed and have effect accordingly, and in the case of an interest in any property expressed to be given to an heir or heirs or any particular heir or class of heirs, the same person or persons shall take as would in the case of freehold land have answered that description under the general law in force before the commencement of this Act." The Rule in *Shelley's Case* is considered later. The effect of the new law is to reverse the rule. Section 176 of the Act enables a tenant in tail of full age in possession to dispose of the entailed property as if he had previously disentailed it, but he must refer specifically either (a) to the property, or (b) to the instrument under which the property was acquired, or (c) to entailed property generally. The section does not extend to a tenant in tail who is by statute restrained from barring his estate tail or to a tenant in tail after possibility of issue extinct (*c*). The section only applies to wills executed or confirmed or republished after 1925.

Power to dispose of entailed property by will.

It thus becomes necessary to consider what words in a deed are sufficient to create an estate tail. The correct way to grant an estate tail is to "A and the heirs of his body" or to "A in tail" (*d*); or, for an estate in tail male, to "A and the heirs male of his body" or to "A in tail male." As a general rule it is necessary to use these formal words, and estates tail will not be implied in a deed (*e*).

What words create an estate tail in a deed.

But in a deed the word "heirs" may be explained to mean "heirs of the body," and a limitation to "A and his heirs," followed by a limitation over if A dies "without issue" or "without heirs of his body," confers an estate tail in A (*f*). Thus in *Morgan* v. *Morgan* (*g*) land was conveyed to the use of the settlor for life with remainder to the use of D. his heirs and assigns, but if D. should die without issue, then to the use of T. his heirs and assigns, and if both D. and T. died without issue, then to the issue male of the settlor. Held, that T. took an equitable estate tail.

The word "heirs" explained.

(*c*) See Fines and Recoveries Act, 1838, s. 18.
(*d*) Law of Property Act, 1925, s. 60, sub-s. 4.
(*e*) *Ante*, p. 635.
(*f*) *Bamfield* v. *Popham*, 1 P. Wms. 54, note at p. 57, and the other early cases cited in Norton on Deeds, p. 338.
(*g*) L. R. 10 Eq. 99 See *Arthur* v. *Walker*, [1897] 1 Ir. R. 68.

But a gift over on death "without leaving issue" will not have this effect (*h*).

Again, a limitation by deed to A and his heirs with a limitation over on failure of heirs of A to B, who is capable of being a collateral heir to A, gives A an estate tail (*i*).

(*h*) *Olivant* v. *Wright*, 9 Ch. D. 646. See also *Idle* v. *Cook*, 1 P. Wms. 70 (default of such issue); *Bayley* v. *Morris*, 4 Ves. 788 (for want of such heir male).

(*i*) *Doe* v. *Littledale and Smeddle*, 2 B. & Ald. 126; *Wall* v. *Wright*, 1 Dr. & War. 1; *Shelley* v. *Earsfield*, 1 Rep. in Ch. 206. For the cases on wills, see *ante*, p. 1809.

CHAPTER XLVIII (*a*).

RULE IN SHELLEY'S CASE BEFORE 1926.

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I.—The Rule as applied to Direct Limitations.—(1) *Nature of the Rule.*—" The rule in *Shelley's Case*," says Mr. Jarman (*b*), " is a rule of law, and not of construction (*c*). The rule simply is, that, where an estate of freehold is limited to a person, and the same instrument contains a limitation, either mediate or immediate, to his heirs or the heirs of his body, the word *heirs* is a word of limitation, *i.e.*, the ancestor takes the whole estate comprised in this term. Thus, if the limitation be to the heirs of his body, he takes a fee tail; if to his heirs general, a fee simple " (*d*).

Nature of the rule in *Shelley's Case.*

(*a*) The rule is abolished in the case of wills coming into operation after 1925; consequently Sects. I, II and III of this Chapter apply only to wills of persons who died before 1926.

(*b*) First ed. Vol. II, p. 241. Additions to Mr. Jarman's footnotes are in square brackets.

(*c*) The comprehensive nature of the present work renders it impossible to present more than a brief outline of the chief practical points connected with the rule in *Shelley's Case*, which require the attention of the student or the practitioner; and this plan is the more willingly submitted to, since the subject has received an elaborate investigation from several writers, who have brought great learning and abilities to the task.

[In *Bowen* v. *Lewis*, 9 A. C. p. 907, Lord Cairns said that in his opinion the rule is " not a technical rule, but a rule of substance to give effect to the intention," *i.e.*, an intention gathered from the whole will that the estate shall travel through the issue generally of a certain person. But the rule applies notwithstanding any contrary intention: *Re Hobbs*, [1917] 1 Ch., at p. 590.]

(*d*) *Shelley's Case*, 1 Rep. 93, 104 *a*. The question was not directly raised in this case, but was incidentally much discussed. [Gavelkind lands are within the rule: *Doe* d. *Bosnall* v. *Harvey*, 4 B. & Cr. 610.] See some observations on the nature and origin of the rule, Fea. C. R., and Hayes's Supplem.; Prest. Est., Vol. I, c. 3; [for a short history of the rule see Lord

Only applies to limitations by way of remainder.

The rule is usually stated in the above general terms, but by the word "limitation," we must understand a limitation by way of remainder, as distinguished from a limitation by way of executory devise or a shifting use, which, though it be to the heirs of a person taking a previous estate of freehold, vests in the heir as a purchaser (*e*).

Perrin v. *Blake.*

The rule, continues Mr. Jarman, "is well illustrated in the celebrated case of *Perrin* v. *Blake* (*f*). There A., by his will, declared, that if his wife should be *enceinte* with a child at any time thereafter (but which never happened), and it were a male, he devised his real and personal estate equally to be divided between the said infant and his son W., when the infant should attain twenty-one; and he declared it to be his intent that none of his children should dispose of his estate for longer than his life; and to that intent he devised all his estate to the said W. and the said infant, *for the term of their natural lives*; remainder to G. and his heirs for the lives of the said W. and the infant; remainder *to the heirs of the bodies of the said W. and the said infant* lawfully begotten or to be begotten; remainder to the testator's daughters for the term of their natural lives, equally to be divided between them; remainder to G. and his heirs during the lives of the daughters; remainder to the heirs of the bodies of the said daughters, equally to be divided. The question was, what estate W. took. Lord Mansfield, Mr. Justice Aston, and Mr. Justice Willes (Mr. Justice Yates, diss.), held that he was tenant for life only; but their judgment was reversed by a majority of the Judges in the Exchequer Chamber, who held, that W. took an estate tail. An appeal was brought in the House of Lords, but was compromised.

Macnaghten's judgment in *Van Grutten* v. *Foxwell*, [1897] A. C., at p. 668]. See also *Earl of Bedford's Case*, Moore, 718; *Whiting* v. *Wilkins*, 1 Bulstr. 219; *Rundale* v. *Eeley*, Cart. 170; *Broughton* v. *Langley*, 2 Ld. Ray. 873; 2 Salk. 679, and cases *passim* in the next chapter.

[(*e*) *Lloyd* v. *Carew*, Pre. Ch. 72; Show. P. C. 137; *per* Lord Cranworth, C., *Coape* v. *Arnold*, 4 D. M. & G., at p. 589; Fea. C. R. 276; Gilb. Uses, 21; Hayes on Limitations, 4, 51, 52. This was questioned by Malins, V.-C., in *White and Hindle's Contract*, 7 Ch. D., at p. 203. In this case *Crofts* v. *Middleton*, 2 K. & J. 194, was cited arg. as deciding that under a devise to A for life, remainder to her children in fee, with alternative remainder to her heirs if (as happened) she should have no children, the life estate and the remainder to heirs would not coalesce. This is, of course, not law, and found no favour with Malins, V.-C.; nor was it, indeed, so laid down or suggested in the case cited. The question there was whether the remainder to the heirs, which, by the operation of the rule in *Shelley's Case*, was executed in A, was vested or contingent. Wood, V.-C., held that it was contingent, and, consequently, that A, being f. c., had not effectually disposed of it by means she had used. On appeal (8 D. M. & G. 192) the question whether the remainder was vested or contingent was left undecided: as to which see *Egerton* v. *Massey*, 3 C. B. (N.S.) 338, *ante*, Vol. I, p. 948.]

(*f*) 4 Burr, 2579; 1 W. Bl. 672; 1 Coll. Jur. 283; Harg. Law Tracts, 489, n.; Hayes's Inquiry, 227, n.

Rule never infringed.

"Since this solemn determination (*g*) the rule in question has been regarded as one of the most firmly established rules of property, and, strictly speaking, no instance can be adduced of a departure from it. Undoubtedly, in many cases a devise to a person for life, and, after his death, to the heirs of his body, has been held, by force of the context, to give an estate for life only to the ancestor (*h*); but this has been the result, not of holding the heirs of the body, as such, to take by purchase, but of construing those words to designate *some other class of persons* generally less extensive. The rule, therefore, was excluded, not violated, by this interpretation.

Preliminary question of construction.

"Whether the testator, by this or any other expression, mean to describe heirs of the body, is a totally distinct inquiry, and has therefore in the present treatise been separately discussed (*i*). The blending of the two questions tends to involve both in unnecessary perplexity."

The rule applies to copyholds and estates *pur auter vie*.

The principle of the rule in *Shelley's Case* applies to limitations of copyholds (*k*) and of estates *pur auter vie* (*l*).

Gift to A for life, remainder to his executors.

An analogous relation subsists between a man and his personal representatives; thus Lord Coke says (*m*): "If a man make a lease for life to one, the remainder to his executors for twenty-one years, the term for years shall vest in him, for even as ancestor and heir are *correlativa* as to inheritance, (as if an estate for life be made to A, the remainder to B in tail, the remainder to the right heirs of A, the fee vesteth in A as it had been limited to him and his heirs,) even so are the testators and the executors *correlativa* as to any chattel" (*n*). But this would seem to be rather a rule of construction, in order to promote the intention.

Limitations must be created by same instrument.

Mr. Jarman continues: "It is to be observed, that to let in the application of the rule in *Shelley's Case*, the limitations

(*g*) Indeed, for a long period antecedently the point had been considered as settled beyond dispute; but in the interval between the judgment in B. R. and its reversal in the Exchequer Chamber, all was uncertainty. The profession beheld, with no small degree of consternation, a doctrine which had been regarded as an established principle of law, completely subverted. An interesting statement of the circumstances and progress of this case may be found in Mr. Hargrave's Law Tracts, and in Mr. Holliday's Life of Lord Mansfield.

(*h*) See next chapter.

(*i*) As to where heirs of the body, children, sons, and issue, are used as words of limitation, see *post*.

[(*k*) *Busby* v. *Greenslate*, 1 Str. 445; *Re Catling's Estate*, [1890] W. N. 75; 6 T. L. R. 417, apparently in the manor of which the copyholds were holden there was no custom to entail. *Re Buckton*, [1907] 2 Ch. 406 (where there was a custom to entail). *Re Hack*, [1925] Ch. 633 (where the limitation in remainder was to the heir-at-law).

(*l*) *Low* v. *Burron*, 3 P. W. 262; *Forster* v. *Forster*, 2 Atk. 259.

(*m*) Co. Lit. 54 *b*.

(*n*) See accordingly *Kirkpatrick* v. *Capel*, Sugd. Pow. 75 (8th ed.); *Holloway* v. *Clarkson*, 2 Ha. 521; *Devall* v. *Dickens*, 9 Jur. 550; *Page* v. *Soper*, 11 Ha. 321.]

to the ancestor, and to his heirs, must be created by the same instrument. Therefore, where (*o*) A had, on the marriage of B his son, settled lands on the son for life, remainder to the sons of that marriage successively in tail male, reversion to himself in fee, and by will devised the same to the issue of B by any other wife in tail male; it was held that this devise did not make B tenant in tail, but gave his heir of the body an estate tail by purchase.

Will and schedule.

"But a will, and a schedule to it, are considered as one instrument for the purposes of this rule (*p*); and the same principle undoubtedly applies to a will and a codicil, or several codicils.

Deeds creating and exercising powers.

"It is contended by Mr. Fearne (*q*) that, where one limitation is contained in an instrument creating a power, and the other in an appointment under such power, the rule will apply (*r*); but the position has been, with much reason, questioned by other learned writers (*s*).

Legal and equitable interests.

"The rule in *Shelley's Case* applies to equitable as well as legal interests (*t*); but the estate of the ancestor, and the limitation to the heirs, must be of the same quality, *i.e.*, both legal or both equitable. It frequently happens that a testator devises land in trust for a person for life, and, after his death, in trust for the heirs of his body, but gives the trustees some office in regard to the tenant for life that causes them to retain the legal estate during his life, but which, ceasing at his death, does not prevent the limitation to the heirs of the body from being executed in them. In such cases, by the rule just stated, they take as purchasers. The converse case of course may, but it rarely does, occur (*x*).

(*o*) *Moore* v. *Parker*, Ld. Raym. 37; Skinn. 558.

(*p*) *Hayes* d. *Foorde* v. *Foorde*, 2 W. Bl. 698.

(*q*) C. R. 75. [And so Sug. Pow. 472 (8th ed.); Hayes on Limitations, 51.]

(*r*) *Venables* v. *Morris*, 7 T. R. 342.

(*s*) Butl. n. to Co. Lit. 299 *b*; 1 Prest. Est. 324.

[(*t*) *Reynell* v. *Reynell*, 10 Bea. 21; *Baile* v. *Coleman*, 2 Vern. 670; Fearne, C. R. 124 *et seq.*; *Re Norrington*, 40 T. L. R. 96. See also *Richardson* v. *Harrison*, 16 Q. B. D. 85. *Re Youman's Will*, [1901] 1 Ch. 720. And there are no degrees of equity: *Nouaille* v. *Greenwood*, T. & R. 26; *Re White and Hindle's Contract*, 7 Ch. D. 201. It is presumed that section 1 of the Land Transfer Act, 1897, did not have the result of preventing any devise in a will (other than a devise to executors) being legal for the purpose of determining whether the rule in *Shelley's Case* applies, but the point has not come before the Courts, and it might be contended that, since the rule in *Shelley's Case* is a rule of law, all devises contained in wills which are subject to the Land Transfer Act, 1897, are equitable unless the devisee is also executor.]

(*x*) An unsuccessful attempt to support such a construction was made in *Nash* v. *Coates*, 3 B. & Ad. 839, where it is observable that the trustees had not any office to perform except to preserve the contingent remainder,

Legal estate clothed with a trust.

"Where the limitations to the devisee for life, and to the heirs of his body, both carry the legal estate, the fact that one of them is subject to a trust does not prevent the application of the rule. Mr. Fearne, indeed, seems to have been of a contrary opinion (*y*); but the affirmative has been successfully maintained by his learned editor and Mr. Preston (*z*), on the well-known principle, that trust estates [were] not objects of the jurisdiction of Courts of Law.

Limitation of life estate to separate use of married woman.

"In the recent case of *Douglas* v. *Congreve* (*a*), real and personal estate were given to a *feme covert* for life *for her separate use*, and, after her decease, to her husband for life, with remainder to the heirs of her body in tail, accompanied by a declaration that the aforesaid limitations were intended by the testator to be in strict settlement; and it was contended, that, as the testator had created a trust for the separate use of the devisee, she had merely an equitable interest, (the husband being a trustee for her), with which the legal limitation to the heirs would not unite; but Lord Langdale conclusively answered this reasoning by observing that the legal estate was vested in the wife, and that the power which the law gave to the husband over the real estate of his wife does not alter the nature or quality of that estate."

Rule considered in relation to *estate for life.*

(2) *What is a sufficient Estate of Freehold in the Ancestor.*—"The estate of freehold may be an estate for the life of the devisee himself, or of another person, or for the joint lives of several persons, and may be either absolute or determinable on a contingency, as an estate *durante viduitate* (*b*), and may arise either by express devise, or by implication of law (*c*), which must be, we have seen, a *necessary* implication" (*d*).

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and there was no such remainder unless the words "heirs of the body" were construed *children*; and the Court, by rejecting this construction, destroyed the force of the argument. This case serves to show that the Courts are not disposed to strain the rules of construction for the purpose of preventing the application of the rule in *Shelley's Case.*

(*y*) C. R. 35.

(*z*) Treat. on Estates, Vol. I, p. 311.

(*a*) 1 Bea. 59. [See *Verulam* v. *Bathurst*, 13 Sim. 374. But see *Re Harts's Estate*, [1883] W. N. 164, where Kay, J., held, upon the construction of the whole will, that a devise to trustees to the use of a married daughter for life for her separate use, gave her only an equitable life-estate so as not to coalesce with an ultimate devise "in trust for" the right heirs of the daughter. The ultimate limitation was apparently regarded as clothing the heirs with the legal estate notwithstanding the use of the word "trust," on the principle that the estate of trustees is commensurate with their duties, as there were no directions to sell or other duties imposed on the trustees beyond the life of the daughter. See on this point, *ante*, p. 1784; and see 16 Q. B. D., at p. 108.]

(*b*) *Merrill* v. *Rumsey*, 1 Keb. 888; T. Raym. 126; Fea. C. R. 31; *Curtis* v. *Price*, 12 Ves. 89; *Griffiths* v. *Evan*, 5 Bea. 241.]

(*c*) *Pibus* v. *Mitford*, 1 Ventr. 372; Freem. K. B. pp. 351, 369; T. Raym. 228; *Hayes* d. *Foorde* v. *Foorde*, 2 W. Bl. 698; [and see Fearne, C. R. 40 *seq.*]

(*d*) *Ante*, pp. 606 *seq.*

Freehold resulting for life.

Coape v. *Arnold.*

In what cases the freehold shall be said to result by operation of law is a preliminary question of construction. In *Coape* v. *Arnold* (*e*), there was a devise to G. H., the testator's eldest son, for ninety-nine years if he should so long live, and subject to the said term to trustees and their heirs during the life of G. H., upon trust only to support the contingent remainders thereinafter limited (but not expressly upon trust for G. H.), and after the determination of the said estates unto the heirs of the body of G. H., and for want of such issue, the testator devised to his second son, and to the same trustees, and to the heirs of the body of the second son, in like manner, with remainders over. By a codicil the testator confirmed his will, and devised all his freehold and copyhold estates to four trustees, upon trust to convey to the trustees of his marriage settlement such part as with the provision in the settlement would make up £1,200 jointure for his wife, and he empowered his trustees to sell, convey, and exchange or mortgage his said estates, and he charged them with payment of his debts. It was admitted that under the will standing alone the heirs of the body of the eldest son would have taken by purchase since the legal estate was devised to them; but it was contended that, as by the codicil the legal estate was vested in the trustees, the limitation to the heirs of the body of the eldest son became an equitable limitation and united with the equitable freehold which descended or resulted to the eldest son under the trust for preserving contingent remainders, and that he thus became equitable tenant in tail. Sir J. Stuart, V.-C., however, decided that the eldest son did not take an estate tail. He said: "As there is an express devise of the beneficial interest to G. H. for ninety-nine years if he should so long live, if an equitable freehold resulted to him by operation of law, the codicil having made all the devises in the will equitable estates, *either the term for ninety-nine years must be merged* in the resulting freehold, or G. H. must have had two equitable estates co-existing in him, one for the term of ninety-nine years if he so long live, the other the freehold said to result by operation of law. There are difficulties in holding, consistently with decided cases, that the freehold can result by implication to the *heir*, to whom an express estate is given for a term of years." He then cited authorities (*f*) to show that on a

[(*e*) 2 Sm. & Gif. 311; 4 D. M. & G. 574. See a letter (7 Jur. (N.S.) Pt. II, 264) signed "W. H." where the writer disputes the possibility of a *particular* estate resulting to the heir (see the same author to the same effect more at large, Hayes on Limitations, p. 63), and supports the decision on independent grounds.

(*f*) Particularly *Adams* v. *Savage*, and *Rawley* v. *Holland*, stated Fea. C. R. p. 43; Preston on Merger (Conveyancing, Vol. iii) pp. 212 and 514; but with the result in those cases of making the whole conveyance void and leaving the whole estate in the grantor.

conveyance no estate could by implication of law result to the *settlor* which would be inconsistent with or annihilate an estate expressly limited to him.

But it is submitted that, both term and life-estate being equitable, there need have been no merger (*g*); and if it had been otherwise, still as the heir takes without, and even in spite of, intent, whatever is not well given to someone else (*h*), merger furnishes no valid argument against his title. Where was the beneficial interest during the life of G. H., if not in him? The trustees of the term were expressly excluded (*i*).

But the V.-C. relied on this further ground, that when the particular purpose of the codicil, *viz.*, raising the jointure and debts, was satisfied, the trustees of the codicil would be bound to reconvey according to the limitations of the will, and *in its very language*. And on this latter ground exclusively the decision was affirmed. Lord Cranworth's judgment contains some observations which, taken alone, might seem to favour the doctrine that the rule would not apply if it could be collected that the testator did not intend that it should operate; which would in effect make it a rule of construction. But he added, "The short ground of my decision is that the only effect of the codicil was to transfer the legal estate to the trustees, upon trust, after making due provision for the jointure and debts, to put the estate in precisely the same course of enjoyment as that in which it would have gone if no codicil had been made; and this certainly did not give G. H. an estate which enabled him to defeat the remainder, limited to the heirs of his body. I must not be understood as at all impugning the doctrine that the rule in *Shelley's Case* does not depend upon, and cannot be controlled by, the intention of the testator; if the estates created are such as to bring the rule into operation, the rule will prevail even against a declared intention to the contrary. But where the question is, what estates, upon the true construction of the will, were meant to be created, —did the testator mean to create an estate of freehold, or only an estate for years?—there intention may and must be regarded; and here, looking to the intention of the testator, I cannot doubt that he meant to give to the first taker an estate for years only, with the express object of avoiding the operation of the rule. In such a case it is, I think, the duty of the Court to give effect to the intention."

Lord Cranworth's judgment in *Coape* v. *Arnold*.

(*g*) Prest. Merg. 557.
(*h*) *Ante*, pp. 684 *seq.*
(*i*) The V.-C.'s opinion would seem to have been that they had the equitable estate during the life of G. H. (2 Sm. & G., at p. 325); but it is difficult to concede this against the express declaration of trust. It follows (as there are no degrees of equity) that they took no estate whatever.

It would seem, therefore, that the L.C. treated the trust as executory (*k*). He is reported, indeed, to have disclaimed this ground; but if the conveyance, when made by the trustees, would have altered the *sense* of the words as they stood in will and codicil, it matters little whether this was by adhering to the letter or by changing it. On no other ground could the Court have avoided deciding what became of the beneficial interest during the life of G. H.

Expressions negativing a larger estate than for life.

"It is to be observed, too," continues Mr. Jarman (*l*), "that words, however positive and unequivocal, expressly negativing the continuance of the ancestor's estate beyond the period of its primary express limitation, will not exclude the rule (*m*); for this intention is as clearly indicated by the mere limitation of a life estate, as it can be by any additional expressions; and the doctrine, let it be remembered, is a rule of tenure, which is not only independent of, but generally operates to subvert, the intention.

Interposition of trustees to preserve contingent remainders, etc.

"Upon the same principle, neither the interposition of a trust estate to preserve contingent remainders, between the estate for life and the limitation to the heirs of the body (*n*), nor a declaration that the first taker shall have a power of jointuring (*o*), or that his estate shall be without impeachment of waste (*p*), or, if a woman, for her separate use (*q*), or that the devisee shall [only have an estate for life, or be 'strict' tenant for life,] will prevent the remainder to the heirs attaching in the ancestor (*r*)."

(3) *What Limitations to the Heirs are sufficient.*—With respect to the limitation to heirs general of the tenant for life it is clear that the expressions "heir," or "next heir," have the same effect as "heirs," provided no words of limitation are

(*k*) As to which see below, Sect. II.]

(*l*) First ed., Vol. II, p. 246.

(*m*) *Robinson* v. *Robinson*, 1 Burr. 38; 2 Ves. sen. 225; 3 B. P. C. Toml. 180 *nom. Robinson* v. *Hicks*, stated *post*, p. 1877; *Perrin* v. *Blake*, 4 Burr. 2579, *ante*, p. 1816; *Hayes* d. *Foorde* v. *Foorde*, 2 W. Bl. 698; *Thong* v. *Bedford*, 1 B. C. C. 313; [*Roe* d. *Thong* v. *Bedford*, 4 M. & Sel. 362].

(*n*) *Coulson* v. *Coulson*, 2 Stra. 1125; *Hodgson* v. *Ambrose*, 1 Doug. 337; 3 B. P. C. Toml. 416; *Sayer* v. *Masterman*, Amb. 344; *Measure* v. *Gee*, 5 B. & Ald. 910.

(*o*) *King* v. *Melling*, 2 Lev. 58; 1 Vent. 225; 3 Keb. 42.

(*p*) *Papillon* v. *Voice*, 2 P. W. 471; *Denn* d. *Webb* v. *Puckey*, 5 T. R. 299; *Frank* v. *Stovin*, 3 East, 548; *Jones* v. *Morgan*, 1 B. C. C. 206; *Bennett* v. *Earl of Tankerville*, 19 Ves. 170.

(*q*) *Lady Jones* v. *Lord Say and Seal*, 8 Vin. Ab. 262, pl. 19; 3 B. P. C. Toml. 113; though in this case it was held that the estate for life was equitable, and the gift to the heirs carried the legal estate. See also *Roberts* v. *Dixwell*, 1 Atk. 607.

(*r*) *Roe* d. *Thong* v. *Bedford*, 4 M. & Sel. 362; 1 B. C. C. 313, [and see also *Macnamara* v. *Dillon*, 11 L. R. Ir. 29 and *Re Keane's Estate*, [1903] 1 Ir. R. 215].

added (*s*). Thus, in *Fuller* v. *Chamier* (*t*), a devise to A, B, and C, and after their decease to the next lawful heir of A for ever, was held to give A an estate in fee simple. But words of limitation in fee added to the word "heir" make it a word of purchase, so that if lands are devised to A for life, and after his death to his heir and the heirs of such heir, A takes only an estate for life with a contingent remainder in fee to the person who at his death is his heir (*u*).

Rule in regard to limitation to the heirs.

Mr. Jarman continues: "With respect to the limitation to the heirs of the body, it is (as before suggested) immaterial whether they are described under that *or any other denomination*, since it is clear that in every case in which the word 'issue' or 'son' is construed to be a word of limitation, and follows a devise to the parent for life or for any other estate of freehold, such parent becomes tenant in tail by force of the rule in *Shelley's Case* (*x*). The words in question are read as synonymous with *heirs of the body*, and consequently, the effect is the same as if those words had been actually used. Upon the same principle, in the converse case, *i.e.*, where the words *heirs of the body* are explained to mean some other class of persons, the rule does not apply (*y*).

Immaterial under what denomination heirs are described.

Limitation to the heirs by implication.

"It is clear, too, that the limitation to the heirs of the body may arise by implication; as (if the will is subject to the old law) in the case of a devise to A for life, and in case he shall die without heirs of his body, or without issue, then to B. Such a case (in which the first taker, beyond all doubt, has an estate tail) is an exemplification of the rule in *Shelley's Case*. A gift to the issue or to the heirs of the body is implied; and the effect is, that the devise is read as a gift to A for life, and after his death to his issue or heirs of the body (*a*), which

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[(*s*) *Per* Sir W. Grant in *Blackburn* v. *Stables*, 2 V. & B. 367, stated *post*, p. 1833. See also *Lewthwaite* v. *Thompson*, 36 L. T. 910 (A for life and after her decease to descend to her female heir).

(*t*) L. R. 2 Eq. 682; *Silcocks* v. *Silcocks*, [1916] 2 Ch. 161 (his male heir for ever).

(*u*) Fearne Cont. Rem. 148; *Greaves* v. *Simpson*, 10 Jur. (N.S.) 609; 12 W. R. 773; *Evans* v. *Evans*, [1892] 2 Ch. 173; *Re Hussey and Green's Contract*, [1921] 1 Ch. 566 (his heir-at-law absolutely). Compare *Re Davidson's Settlement*, [1913] 2 Ch. 499 as to the difference between a will and a deed.

(*x*) *Robinson* v. *Robinson*, 1 Burr. 38; 2 Ves. sen. 225; *Mellish* v. *Mellish*, 2 B. & Cr. 520; 3 D. & Ry. 804; *Griffiths* v. *Evan*, 5 Bea. 241; *Harvey* v. *Towell*, 7 Hare, 231; see *S. C.*, 12 Jur. 241; *Tate* v. *Clarke*, 1 Bea. 100; *Doe* v. *Rucastle*, 8 C. B. 876; *Lewis* v. *Puxley*, 16 M. & Wels. 733; *Re Buckton*, [1907] 2 Ch. 406; and see Chap. L.

(*y*) See *post*, pp. 1857 *seq.*, and *Brookman* v. *Smith*, L. R. 7 Ex. 271, where a limitation to "the heirs and assigns of A. as if she had not been married" (which excluded her lineal descendants) was held not within the rule. See also *Allgood* v. *Blake*, *ib.*, at p. 363].

(*a*) See Lord Hardwicke's judgment in *Lethieullier* v. *Tracy*, as reported 1 Ken., at p. 56.

brings it to the common case illustrative of the rule. These positions are indisputable, but the first and third appear to be frequently lost sight of.

As to declaration that heirs shall take by purchase.

"As no declaration, the most positive and unequivocal, that the ancestor shall take only, or his estate be subject to the incidents of, a life estate, will exclude the rule, so a declaration, that the heirs shall take as purchasers, is equally inoperative to have such effect (*b*).

It has been already mentioned that a limitation to the "heir of the body," or "heir male of the body," or "next heir male," or "first heir male," with no words of limitation added, has the same effect in giving the devisee for life an estate tail as if the plural had been used (*c*). If, however, words of limitation are added, these expressions give an estate by purchase to the heir. Thus, if land is devised to A for life, and after his death to his next heir male and the heirs male of such next heir male, this gives A an estate for life, with remainder in tail male to the heir male of his body (*d*), or an estate in fee simple can be given to the heir male of A (*e*).

Effect of contingent limitation to the heirs.

Mr. Jarman continues (*f*): "The rule in *Shelley's Case* applies where the limitation to the heirs of the body is *contingent*. Thus, under a devise to A and B for their joint lives, with remainder to the heirs of the body of him who shall die first, the heir takes by descent (*g*).

Such limitation contingent, when.

"It seems, however, that the mere possibility of the estate of freehold determining before the ancestor has heirs of his body (*i.e.*, before his decease, since *nemo est hæres viventis*) does not render the limitation contingent. Thus, where (*h*) lands were limited to A *during widowhood*, and, after her death, *to the heirs of her body* (in which case it is evident that, by the marriage of A, her estate would be determined before she could have any heirs of her body), Sir W. Grant, M.R., held that an absolute estate tail was executed in her; and this accords with the resolution of the Judges in the early case of *Merrill* v. *Rumsey* (*i*).

Possibility of freehold determining in lifetime of ancestor.

"The difference between these and the former cases is, that there the limitation is contingent in the very terms of its creation, and the rule, therefore, does not alter it in this respect; but in the latter cases, the limitation is merely contingent by the application of a principle of law governing remainders; and when

(*b*) See Harg. Law Tracts, 562.

[(*c*) *Bawsy* v. *Lowdall*, Sty. 249; *Burley's Case*, cit. 1 Vent. 230; *Richards* v. *Bergavenny*, 2 Vern. 324, and other cases cited *ante*, p. 1803.

(*d*) *Archer's Case*, 1 Rep. 66, *ante*, p. 1803.

(*e*) *Willis* v. *Hiscox*, 4 My. & Cr. 197, *ante*, p. 1804.

(*f*) First ed., Vol. II, p. 247.]

(*g*) [Co. Lit. 387 *b*, and] see 1 Prest. Est. 316.

(*h*) *Curtis* v. *Price*, 12 Ves. 89.

(*i*) T. Ray. 126, 1 Keb. 888. But see 1 Sid. 247.

the rule under consideration operates to prevent its taking effect as a remainder, it destroys its contingent quality. The same principle is applicable in the case of a devise to A for the life of B, remainder to the heirs of his body; for as the limitations operate by force of this rule to give an executed estate tail, that estate is not affected by the circumstance of B, the *cestui que vie*, dying in the lifetime of A, and, consequently, before he has any heir of his body" (*k*).

Limitation to heirs of tenant of freehold *and of another person.*

(4) *Questions where one or all of the Limitations relate to several Persons.*—"It is essential to the operation of the rule in *Shelley's Case*, that the heirs of the body should proceed from the person taking the estate of freehold, and of that person only; for, if the devise be to A for life, and, after his decease, to the heirs of the body of A, *and of another person*, who might have a common heir of their bodies, it is a contingent remainder in tail to the heirs.

To wife for life, remainder to heirs of the bodies of husband and wife.

To wife and heirs of body of husband and wife.

"Thus, in *Gossage* v. *Tayler* (*l*), where the limitations were to the wife for life, remainder to the heirs to be begotten on the body of the wife by the husband, the heirs were held to take by purchase. And the same construction prevailed in *Frogmorton* d. *Robinson* v. *Wharrey* (*m*), where S. surrendered copyholds to the use of M., his then intended wife, [and] the heirs of their two bodies lawfully to be begotten; [although the limitation to the heirs was not expressed to be by way of remainder, and the estate of the wife was not limited expressly to a life estate].

"It may be observed, that, under such limitations, if the person taking the estate for life die in the lifetime of the other, the contingent remainder to the heirs fails (*n*); for, as there could be no heir of their bodies until the death of both (*nemo est hæres viventis*), the failure of the particular estate before that period defeats the remainder (*o*).

Distinction where there could not be joint heirs of the bodies.

"But if, in such a case, the tenant for life and the other person to whose heirs the limitation is made are of the same sex, or, being of different sexes, are not actually married, and are so related by consanguinity or affinity, that they cannot have, or be presumed to have, common heirs of their bodies, the effect is obviously different; for, as the testator cannot mean heirs

(*k*) See Perkins, s. 337; *Merrill* v. *Rumsey*, 1 Keb. 888; T. Ray. 126; Fea. C. R. 31.

(*l*) Sty. 325, [cited again, *post*, p. 1827].

(*m*) 3 Wils. 125, 144; 2 W. Bl. 728. See also *Lane* v. *Pannell*, 1 Roll. Rep. pp. 238, 317, 438.

(*n*) *Lane* v. *Pannell*, 1 Roll. Rep. 238, pp. 317, 438; [*Anon.*, Dy. 99 b].

(*o*) See this rule adverted to, *ante*, p. 1417; [and remember stat. 40 & 41 Vict. c. 33, by virtue of which contingent remainders became capable of taking effect in such cases as executory devises].

issuing from them both, the limitation is to be read as a limitation to the heirs of the body of A, the tenant for life, and to the heirs of the body of the other person respectively. The consequence is, that the former becomes, by force of the rule, tenant in tail of one undivided moiety, and the heir of the latter takes the other moiety by purchase.

Where ancestor is tenant in common of freehold.

"*Pari ratione*, if A and B were tenants in common for life, with remainder, as to the entirety, to the heirs of the body of A, he would be tenant in tail of one undivided moiety, and there would be a contingent remainder in tail to the heirs of his body in the other moiety.

"Where the freehold is limited to husband and wife concurrently (and the same principle seems to apply in regard to persons capable, *de jure*, of becoming such), with remainder to the heirs of their bodies, the heirs, by the operation of the rule in question, take by descent (*p*). And the effect, it should seem, would be the same, if *successive* estates for life were limited to the husband and wife, or to persons capable of becoming such, with remainder to the heirs of their bodies (*q*).

Limitation to heirs of one joint-tenant of freehold.

"Here it may be observed, that, where there is a limitation to two persons jointly, with remainder to the heirs of the body of *one* of them, the disentailing assurance (now substituted for a common recovery) of the latter will acquire the fee simple in a moiety (*r*). . . .

Further observations on limitations of this nature.

"Questions of this kind have most frequently occurred under limitations in marriage settlements, but they may of course arise under wills. In deciding on the application of the rule to such cases, the first object should be, to see out of whose body the heirs are to issue; and if it be found that they are to proceed from any person who takes an estate of freehold, and him or her only, such person becomes tenant in tail. If from a person who takes an estate of freehold jointly with another not taking any such estate, it seems he or she will take an estate tail *sub modo* only (*s*). If from a person who takes an undivided estate in common, he will then, we have seen, take an estate tail to the extent of that undivided interest; but if the heirs of the body are to proceed from two persons as husband and wife, and *one* of them only takes an estate for life, the heirs will be purchasers.

(*p*) See *Roe* d. *Aistrop* v. *Aistrop*, 2 W. Bl. 1228.

(*q*) *Stephens* v. *Britridge*, 1 Lev. 36; T. Ray, 36. [And see 1 Preston, Est. 336.]

(*r*) *Marquess of Winchester's Case*, 3 Rep. 1.

(*s*) See Fea. C. R. 36.

Distinction between heirs *of* the body and heirs *on* the body to be begotten.

"If the limitation is to husband and wife, and the heirs to be begotten *on* the body of the wife by the husband, this will be an estate tail in both (*t*); for, as the heirs are not in terms required to be of the body of either in particular, the construction is the same as if they were to issue from *both*; and, accordingly, we have seen that where such a limitation occurred after an estate for life to the wife only, it was held, that she did not take an estate tail (*u*).

"On the other hand, if the devise be to the wife for life, and then to the heirs *of* her body to be begotten by the husband, she takes an estate tail special, by force of the rule under consideration (*x*). The distinction, it will be perceived, is between heirs *on* the body and heirs *of* the body.

"So if the limitation were to the husband for life, remainder to the heirs of the body of the husband on the wife to be begotten, he would, by the application of the same principle, have an estate tail special (*y*). But if, in the former case, the estate for life had been limited to the *husband*, and, in the latter, to the *wife*, the heirs of the body would have taken by purchase.

Tenant in tail after possibility of issue extinct.

"Under limitations in special tail, if the tenant in tail survive the other person from whom the heirs are to spring, and there be no issue, such surviving tenant in tail becomes, as is well known, tenant in tail after possibility of issue extinct. In the case of *Platt* v. *Powles* (*z*) it was decided that such was the situation of the testator's widow, to whom lands were devised *for life, and after her decease to the heirs of her body by him*, at the expiration of the period during which she might have had issue by the testator, namely, nine or ten months after his death. During that time, issue being, in contemplation of law, possible, (irrespective of age,) and the devisee, therefore, being tenant in tail, she might have acquired the fee by means of a common recovery."

Rule considered in regard to executory trusts.

II.—Executory Trusts.—"It has been already observed, that the rule in *Shelley's Case* applies as well to equitable limitations as to legal estates. Mr. Fearne has laboured to establish this conclusion, in opposition to the case of *Bagshaw* v. *Spencer* (*a*), which was decided by Lord Hardwicke, on the

(*t*) [*Roe* d. *Aistrop* v. *Aistrop*, 2 W. Bl. 1228]; *Denn* d. *Trickett* v. *Gillot*, 2 T. R. 431.

(*u*) *Gossage* v. *Tayler*, Sty. 325.

(*x*) *Alpass* v. *Watkins*, 8 T. R. 516.

[(*y*) *Roe* d. *Aistrop* v. *Aistrop*, 2 W. Bl. 1228.]

(*z*) 2 M. & Sel. 65.

(*a*) 1 Ves. Sen. 142; 2 Atk. pp. 246, 570, 577; see Fea. C. R. p. 124 *seq.*

ground of the difference of construction applicable to legal and equitable interests; a doctrine which has been overruled in a long series of cases (*b*), including a subsequent decision of this eminent Judge himself (*c*).

"The preceding remarks, it should be observed, apply only to *executed* trusts; for between trusts *executed* and *executory* there is a very material difference, which requires particular examination.

Executory trust, what.

"A trust is said to be executory or directory where the objects take, not immediately under it, but by means of some further act to be done by a third person, usually him in whom the legal estate is vested. As where a testator (*d*) devises real estate to trustees in trust *to convey* it to certain uses, or directs money to be laid out in land, *to be settled* to certain uses [which are indicated in improper or informal terms (*e*).] In these cases, the direction to convey or settle is considered merely in the nature of instructions, or heads of a settlement, which are to be executed, not by a literal adherence to the terms of the will, which would render the direction to settle nugatory, but by formal limitations adapted to give effect to the purposes which the author of the trusts appears to have had in view (*f*).

Uses in strict settlement, when directed.

"Thus, where a testator devises lands to trustees with a direction to settle them, or bequeaths a money fund to be laid out in the purchase of lands to be settled, to the use of A for life; remainder to trustees during his life to preserve contingent remainders; remainder to the heirs of the body of A (limitations under which, if literally followed, A would be tenant in tail, by force of the rule in *Shelley's Case*,) Courts of Equity, presuming that the testator could not have so absurd an intention as that a conveyance should be made vesting in the first taker an estate, which would enable him immediately to acquire the fee simple by means of a disentailing assurance, execute the trust by directing a strict settlement, *i.e.*, limitations to the use of A for life; remainder to trustees to preserve contingent remainders, remainder to his first and other sons successively in tail (*g*).

(*b*) *Baile* v. *Coleman*, 2 Vern. 670; 1 P. W. 142; [*Papillon* v. *Voice*, 2 P. W. pp. 471, 477;] *Wright* v. *Pearson*, 1 Ed. 119; *Austen* v. *Taylor*, *ib.* 361; Amb. 376; *Jones* v. *Morgan*, 1 B. C. C. 206. See also *Jervoise* v. *Duke of Northumberland*, 1 J. & W. 559, *inf.*; [*Reynell* v. *Reynell*, 10 Bea. 21.]

(*c*) *Garth* v. *Baldwin*, 2 Ves. Sen. 646.

(*d*) See Hayes's Inquiry, 248, 249, and 270.

[(*e*) *Earl Stamford* v. *Hobart*, 3 B. P. C. Toml. 31.

(*f*) Cited with approval by Lord Cairns, L. R. 4 H. L., at p. 572.]

(*g*) *Papillon* v. *Voice*, 2 P. W. 471. See also *Leonard* v. *Earl of Sussex*, 2 Vern. 526; *Earl Stamford* v. *Hobart*, 3 B. P. C. Toml. 31; *Lord Glenorchy*

"So, in *Leonard* v. *Earl of Sussex* (*h*), where lands were devised to trustees and their heirs for payment of debts and legacies, with a direction afterwards to *settle* what should remain unsold, one moiety to the testatrix's son H. and the heirs of his body by a second wife, with remainder over; and the other moiety to the testatrix's son F. and the heirs of his body, with remainders over; taking special care in *such settlement*, that it should *never be in the power* of either of the sons to *dock the entail of either of their moieties* (*i*) :—it was held, that, in executing the settlement, the sons must be made only tenants for life, and should not have estates tail *conveyed* to them, but their estates for life should be without impeachment of waste (*k*) : because here the estate was *not executed*, but only *executory*, and therefore the intent and meaning of the testatrix was to be pursued : she had declared her mind to be, that her sons should not have it in their power to bar their children, which they would have if an estate tail were to be conveyed to them. And the Court took it to be as strong in the case of an *executory* (trust in a) devise, for the benefit of the issue, as if the like provision had been contained in marriage articles; but had the testatrix by her will devised to her sons an estate tail, the law must have taken place; and they might have barred their issue, notwithstanding any subsequent clause or declaration in the will that they should not have power to dock the entail (*l*).

Settlement to be made on A and the heirs of his body.

Direction that it should not be in his power to dock the entail.

"So, in *Lord Glenorchy* v. *Bosville* (*m*), where the devise was to trustees and their heirs, in trust, till the marriage or death of A, to receive the rents and pay her an annuity for her maintenance, and as to the residue, to pay his debts and legacies, and after payment thereof in trust for A; and if she married a Protestant, after her age, or with consent, etc., then *to convey* the estate after such marriage to the use of her *for life*, without impeachment of waste, remainder to her husband for life, remainder to the *issue of her body*, with remainders over : Lord Talbot held, that though A would have taken an *estate tail*, had it been the case of an *immediate devise*, yet that the trust being *executory*, was to be *executed in a more careful and more accurate manner*; and that a conveyance to A

To convey to A for life, without impeachment, etc., remainder to issue of her body.

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v. *Bosville*, Cas. t. Talb. 3; *Ashton* v. *Ashton*, 1 Coll. Jur. 402; *White* v. *Carter*, 2 Ed. 366; Amb. 670; *Horne* v. *Barton*, Coop. 257.

(*h*) 2 Vern. 526.

(*i*) See [also *Thompson* v. *Fisher*, L. R. 10 Eq. 207. But see] observation *infra*.

[(*k*) For the rights of the first taker are to be cut down only so far as necessary to prevent alienation by him; see *post*, p. 1840, note (*g*).]

(*l*) As to this, see *ante*, p. 1441.

(*m*) Cas. t. Talb. 3. See also *Ashton* v. *Ashton*, 1 Coll. Jur. 402.

for life, remainder to the husband for life, with remainder to their first and every other son, with remainder to the daughters, would best serve the testator's intent.

To be purchased and settled to A and his issue in tail male.

"Again, in *White* v. *Carter* (*n*), where a testator gave his personal estate to trustees to purchase land, to be settled and assured as counsel should advise unto and upon the trustees and their heirs, upon trust and to go for the use *of A and his issue in tail male, to take in succession and priority of birth*; and there was a direction to the trustees to pay the dividends of the moneys until the purchase to A *and his sons* and issue male, Lord Northington decreed a strict settlement." This decree was affirmed by Lord Camden upon a rehearing (*o*), who observed that the latter clause put it out of doubt; the testator had there explained his meaning by making use of the words, "sons and issue."

To be conveyed to A for her separate use for life, and after her decease to the heirs of her body.

And in *Roberts* v. *Dixwell* (*p*), where a testator directed his trustees to convey lands in trust for the separate use of his daughter for her life, and so as her husband should not intermeddle therewith, and, after her decease, in trust for the heirs of her body, Lord Hardwicke held this to be an executory trust; and therefore, to prevent the husband becoming tenant by the curtesy (which he could not be consistently with the testator's intention that he should have no manner of benefit from the estate), he decreed that the daughter should be made tenant for life only and not tenant in tail.

To be settled upon A and his issue.

Again, in *Parker* v. *Bolton* (*q*), where the testator devised lands to A and directed him to settle them upon himself and his issue male by his lawful wife, and for want of such issue upon B and his lawful issue, it was held by Pepys, M.R., that A was tenant for life only.

To be purchased and settled on A, his heirs and successors in the direct male line.

And in *Shelton* v. *Watson* (*r*), the testator directed an estate "to be purchased and made *hereditary and settled upon* my here constituted heir, and *to descend to his heirs*, or dying without issue as I shall now provide, and I hereby constitute W. S. my heir and successor, and the said estate when purchased to be settled on him, his heirs and *successors in the direct male*

(*n*) 2 Ed. 366.

(*o*) Amb. 670.

(*p*) 1 Atk. 607, cited 2 Ves. Sen. p. 652, *nom. Sands* v. *Dixwell.*

(*q*) 5 L. J. (N.S.) Ch. 98. Compare *Seale* v. *Seale*, 1 P. W. 290, stated *post.* In *Sweetapple* v. *Bindon*, 2 Vern. 536, it does not appear to have been argued that the daughter ought to have taken only a life estate under the settlement. The two cases last stated in the text seem opposed to the subsequent decision of *Samuel* v. *Samuel*, 14 L. J. Ch. 222; 9 Jur. 222, where a testator directed that * personalty should be settled on A for the *sole* use of A and her lawful issue, and Sir L. Shadwell held that A was absolutely entitled. It is evident that if the subject of gift had been real estate, he would have held A to be tenant in tail.

* To be settled for the *sole* use of A and her issue.

(*r*) 16 Sim. 543; *Duncan* v. *Bluett*, Ir. R. 4 Eq. 469.

line lawfully begotten. In case W. S. die without issue," a similar settlement was directed with respect to the two brothers of W. S. successively, the testator expressing his intent *that the estate should never pass out of his name and family.* Sir L. Shadwell, V.-C., held that W. S. and his brothers were to be made tenants for life only.

A direction to settle land, to go with a dignity which is limited to A and the heirs of his body, will be executed by making A tenant for life; for notwithstanding the limitation the dignity is wholly inalienable (*s*).

Alleged distinction where testator himself declares uses of lands to be purchased.

"But," Mr. Jarman points out (*t*), "a distinction has been sometimes taken between the effect of a clause directing the trustees to purchase land *and settle it*, as in *Papillon* v. *Voice* and *White* v. *Carter*, and a direction to them simply to purchase, the testator himself declaring the uses of the land so to be purchased. Thus, in *Austen* v. *Taylor* (*u*), where the testator devised lands to A for life, without impeachment of waste, remainder to trustees to preserve contingent remainders, remainder to the heirs of the body of A; and bequeathed personal estate to be laid out in land, *which should remain, continue, and be* to the same uses as the land before devised; Lord Northington, after observing in reference to *Papillon* v. *Voice* and *Leonard* v. *Earl of Sussex*, that there the trustees were directed *to settle, and that an estate tail would have been no settlement*, held, that the case before him was distinguishable, inasmuch as the testator had referred to no settlement by the trustees, but had declared his own uses and trusts; which being declared, he knew no instance where the Court had proceeded so far as to alter or change them; accordingly, A was to be tenant in tail in the lands to be purchased.

Disapproved by Lord Eldon.

"This case is stated by Mr. Ambler to have been dissatisfactory to the profession, which is denied by Lord Henley (*x*); but Lord Eldon has spoken of the decision in terms which imply doubt of its soundness (*y*). His lordship also observed, that the Judges who decided *Papillon* v. *Voice*, and *Austen* v. *Taylor*, agreed in the principle, but differed in the application of it. The distinction upon which the latter case is founded,

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(*s*) *Sackville-West* v. *Holmesdale*, L. R. 4 H. L. 543; *Lord Dorchester* v. *Earl of Effingham*, 3 Bea. 180, n.; *Woolmore* v. *Burrows*, 1 Sim. 512; see also *Bankes* v. *Le Despencer*, 10 Sim. 576; 11 Sim. 508; *Montagu* v. *Lord Inchiquin*, 23 W. R. 592. And the same rule applies to a direction to settle chattels to go with a title: *Re Johnston*, 26 Ch. D. 538, 549; but see *Re Gerard*, [1906] W. N. 21.

(*t*) First ed., Vol. II, p. 256.]

(*u*) 1 Ed. 361; Amb. 376.

(*x*) See note, 1 Ed. 369.

(*y*) See *Green* v. *Stephens*, 17 Ves., at p. 76; *Jervoise* v. *Duke of Northumberland*, 1 J. & W., at p. 574.

CHAP. XLVIII.

Disregarded in certain cases.

(or at least is usually supposed to be founded,) certainly has not been invariably adopted; for in *Meure* v. *Meure* (z), where lands were devised to trustees in trust to sell, who with the money arising from the sale were to purchase other freehold lands, or some stock in the public funds, and then to permit A and his assigns to receive the interest and profits for his life, and after his decease to permit the plaintiff and his assigns to receive the interest and profits of the said money as aforesaid, or the rents and profits of the said land, if unsold, or such other lands as should be purchased, *during his natural life*, and after his decease, then in trust *for the use of the issue of the body of the plaintiff lawfully begotten*, and in default of such issue, over; Sir J. Jekyll, M.R., held that, in executing the trust, lands should be purchased *and the plaintiff made tenant for life only*.

Devise of lands to be purchased to A for life, remainder to his issue.

"Here the lands to be purchased were devised immediately to these limitations, without any express direction to settle; and the terms used would, if applied to lands directly devised, clearly have made A tenant in tail (a), and yet he was held to be tenant for life only.

Devise of lands to be purchased to A and the heirs male of his body;

"So in *Harrison* v. *Naylor* (b), where the testator directed his executors to purchase a freehold estate, and *gave and devised* such estate, when purchased, to A, to him and the heirs male of his body for ever; and if A should die without issue male, then *he gave and devised* the said estate to the heir male of his (testator's) daughter E., but if E. had no issue, then he gave and devised the said estate, on a certain condition, to his (testator's) next heir-at-law: and reciting that he was not certain whether it was possible to entail an estate not yet purchased, he directed his executors to consult some eminent lawyers; and if they held, that such entail as was expressed in the will was repugnant to law, then his personal estate should be equally divided between T. and E.: Lord Thurlow said it was impossible to argue against A's having an estate tail, and that the money must be invested (in lands to be settled) to the use of A and the heirs of his body, with a contingent remainder in tail to the person who should answer the description of heir male of E. at the time of her death, with remainder to the

trust executed by simply interposing trustees to preserve contingent remainders.

(z) 2 Atk. 265. [The issue will generally take successive estates tail: *Grier* v. *Grier*, L. R. 5 H. L., at p. 707, where *Dod* v. *Dod*, Amb. 274; *Hart* v. *Middlehurst*, 3 Atk. 371, are cited; even though words of limitation be superadded to "issue": *Phillips* v. *James*, 2 Dr. & Sm. 404, aff. (diss. K. Bruce, L.J.), 3 D. J. & S. 72. In *Hadwen* v. *Hadwen*, 23 Bea. 551, words were added importing a tenancy in common, and the children were held to be tenants in common in tail, and see *Trevor* v. *Trevor*, 1 H. L. C. 239.]

(a) See *post*, Chap. LI.

(b) 2 Cox, 247.

right heir of the testator; but counsel suggesting that, as this was an *executory trust*, the Court would interpose, after the estate tail to A, a limitation to trustees to preserve the contingent remainder to the heir male of E., the daughter, his Lordship was of opinion that such a limitation should be inserted; and declared that the uses were to be to A and his heirs in tail male, *with remainder to trustees to support contingent remainders*, remainder to the heirs male of E., the daughter in fee; and if she should have no heirs male, then to the heir-at-law of the testator in fee.

"By interposing the estate in the trustees Lord Thurlow evidently treated the trust as executory, though the testator had in direct terms devised the purchased lands. In this respect, therefore, the case is another authority against *Austen* v. *Taylor*, of which, however, it may be observed, that to have made A tenant for life only of the lands to be purchased, would have created a diversity between them and the lands devised, which the testator evidently intended should be held together. This distinguishes the case from and reconciles it with those just stated.

Austen v. *Taylor* explained.

"But even where there is a clear direction to the trustees to frame the settlement, the doctrine of some of the cases requires that, to warrant the introduction of limitations in strict settlement, it should be indicated by the context that the testator did not intend an estate tail to be created, according to the technical effect of the expressions used.

Indication that testator did not intend an estate tail, required.

"Thus, in the case of *Seale* v. *Seale* (*c*), where a testator bequeathed money to be laid out in the purchase of lands, to be settled *on A and the heirs male of his body*, Lord Cowper held that A was absolutely entitled to the money not laid out; and, though it was suggested that the Court would order a strict settlement, his lordship observed, that in marriage articles the children are considered as purchasers, but in the case of a will (as this was), where the testator expresses his intent to give an estate tail, a Court of Equity ought not to abridge the bounty given by the testator.

Direction to settle on A and the heirs of his body.

"This principle was carried to a great length in the subsequent case of *Blackburn* v. *Stables* (*d*), where the testator devised the remainder of his real and personal estate in trust to his nephew J., and to M., his executor, for the sole use of a son of the said J., at the age of twenty-four; if he had no son, to a son of testator's great-nephew J.; but if neither of those

Blackburn v. *Stables*.

(*c*) Pre. Ch. 421; 1 P. W. 290. [Compare *Re Howarth*, 60 Sol. J. 307, where the rule in *Shelley's Case* was held not to apply.]

(*d*) 2 V. & B. 367.

CHAP. XLVIII.

That a "proper entail be made to the male heir";

had a son, then to a son of testator's great-niece's daughter E., with a direction to take his (testator's) name: but on whomsoever such his disposition should take place, his will was that he should not be put in possession of any of his effects till the age of twenty-four, nor should his executors give up their trust *till a proper entail were made to the male heir by him* (the person so being entitled). J., the nephew, had no son born at the testator's death, but his wife was then *enceinte* with a son, who was afterwards born, and attained twenty-four: Sir W. Grant, M.R., observed, that 'It is settled that the words "heir," or "heir male of the body," in the singular number, are words of limitation, not of purchase, unless words of limitation are superadded, or there is something in the context to show that the testator did not mean to use the words in their technical sense. But there is nothing in the context of this will from which that can be collected; there is an absence of every circumstance that has commonly been relied on as showing such an intention. The word is "heir," not "*issue*." There is *no express estate for life* given to the ancestor; no clause that the estate shall be *without impeachment of waste; no limitation to trustees to preserve contingent remainders*; no direction so as to frame the limitation that the first taker shall not have the power of barring the entail. Everything is wanting that has furnished matter for argument in other cases: the words are therefore to be taken in their legal acceptation, and the son of J. is entitled to have the conveyance made to him *in tail male*.'

estate tail directed.

"So, in the subsequent case *Marshall* v. *Bousfield* (*e*), where a testator devised to his wife and her heirs, upon trust, that she should enjoy the estates during her life, and, after her decease, that the same *should be settled by able counsel*, and go to and amongst his grandchildren of the male kind, *and their issue in tail male*, and for want of such issue, upon his female grandchildren who should be living at his decease; but the testator declared that the shares and proportions of the male and female grandchildren and their respective issues, should be in such proportions as his wife should by deed or will appoint; and, for want of such appointment, to the testator's own right heirs for ever. The wife appointed in favour of the testator's grandson W. and the heirs male of his body. It was objected that this was an executory trust, under which W. would be made tenant for life, with remainder to his issue in strict settlement: but Sir T. Plumer, V.-C., held, that the words 'in tail male' applied to the grandchildren, and that no language

To be settled upon grandchildren and their issue in tail male.

(*e*) 2 Mad. 166.

was used which had been held in other cases to give only an estate for life. He observed, that unless the grandchildren took an estate tail, the limitation, so far as regarded a grandson who was born after the testator's death, would be void, as being too remote (*f*).

Remark on *Marshall* v. *Bousfield.*

"The latter circumstance constitutes a peculiarity in this case, which otherwise afforded strong arguments in favour of a strict settlement. The estate was to be settled *by able counsel* (*g*), and the word was *issue*, not heirs of the body (*h*). Confidence in the case, too, is weakened by the fact, that another determination of the same Judge on a question of this nature has been impeached (*i*).

"The reader should suspend any conclusion he may be disposed to draw from the two preceding cases of *Blackburn* v. *Stables*, and *Marshall* v. *Bousfield*, until he has carefully weighed them with Lord Eldon's decision in the subsequent case of *Jervoise* v. *Duke of Northumberland* (*k*), where the words were, 'To my son R. I leave all my estates at' B., etc., '*to be entailed upon his male heirs;* and, failing such, to pass to his next brother, and so on from brother to brother, allowing £2,500 each to be raised upon the estates for female children. The above-named estates are to be liable to all my debts at my decease, and to the fortunes left to my younger children, unless otherwise discharged. I direct my estates at M. to be sold, in order to raise money for the above-named legacies, and what falls short to be raised or charged on the other property at' B., etc. The legal estate was not in the testator. In a suit for declaring the right of all parties, Sir T. Plumer, V.-C., decreed, that R. was entitled to an *estate tail.* The estate was afterwards settled on the marriage of R., and was purchased by the Duke of Northumberland, under a power of sale in the settlement; but his grace objecting to the title, a bill was filed to enforce specific performance. It was contended for him that the trust was merely directory, and that the Court, in executing it, would mould the limitations in the nature of a strict settlement; and Lord Eldon thought the contrary so doubtful, that he could not compel a purchaser to take the title. His Lordship, indeed, expressed a strong opinion that

Devise to R *to be entailed* upon his male heirs;

not a clear estate tail in R.

(*f*) But there was ground to contend that, as the limitation to the female grandchildren was confined to those living at his death, the same construction might be given to the gift to the *male* grandchildren.

(*g*) See *White* v. *Carter*, 2 Ed. 366; Amb. 670; *Bastard* v. *Proby*, 2 Cox, 6.

(*h*) See judgment in *Meure* v. *Meure*, 2 Atk. 265. And *Blackburn* v. *Stables*, 2 V. & B. 367, *ante*, p. 1833.

(*i*) See *Jervoise* v. *Duke of Northumberland*, 1 J. & W. 559.

(*k*) 1 J. & W. 559. [See also *Delap* v. *Butler*, [1919] 1 Ir. R. 74, where *Blackburn* v. *Stables* was not followed.]

the trust was directory; and his observations leave us not much room to doubt that, if called upon to execute it, he would have decreed a strict settlement, and not have given R. an estate tail (*l*).

As to giving tenants in tail power to charge.

"Lord Eldon in this case intimated that he did not think that the circumstances of the power being given to the devisee to charge a sum of money on the estate was a conclusive argument that he was to be only tenant for life, since, in many cases, powers are usefully given to a tenant in tail, enabling him to do certain acts more conveniently than by destroying the entail.

Distinction between marriage articles and wills.

"Most of the cases of this kind have arisen on marriage articles (*m*), to which the same principles are applicable as to executory trusts by will, with this difference, that, as it is in every case the object of marriage articles to provide for the issue of the marriage, the nature of the instrument affords a presumption of intention in favour of the issue, which does not belong to wills; and Lord Eldon, in the last case (*n*), intimated, that the observations imputed to him in *Countess of Lincoln* v. *Duke of Newcastle* (*o*) [questioning the distinction,] were to be received with this qualification (*p*).

General observations upon the cases.

"The preceding cases do not clearly demonstrate the precise ground on which Courts of Equity will execute a trust of the nature of those under consideration, by the insertion of limitations in strict settlement. It has sometimes been thought that the principle extends to every case in which the testator has left *anything to be done*; and that the Court only requires it to be shown that the trust is executory, in order to mould the limitations in this manner. Some of Lord Eldon's observations in *Jervoise* v. *Duke of Northumberland* have been supposed to go to this length (*q*); and perhaps it is difficult to place the doctrine, consistently with the liberty which has been taken with the testator's expressions, upon a narrower basis (*r*); but, in the actual state of the decisions, it is too much to hazard a general position of this nature. No case has yet determined

(*l*) But see *Lowry* v. *Lowry*, 13 L. R. Ir. 317.]

(*m*) See Fea. C. R. 90; 1 Prest. Est. 354.

(*n*) 1 J. & W. pp. 571, 574.

(*o*) 12 Ves. pp. 227, 230.

(*p*) See *Rochford* v. *Fitzmaurice*, 1 Conn. & L. 158; [2 D. & War. 1; *Sackville-West* v. *Holmesdale*, L. R. 4 H. L. 543.]

(*q*) See Hayes's Inq. 262, n.

(*r*) If the Courts are bound to require an indication that the testator intended only an estate for life, would it not seem that by parity of reason they are obliged to adhere to the testator's language, *ultra* this object, provided the will contained no further evidence that he does not mean an estate tail, *i.e.*, by giving the ancestor an *equitable* freehold, and the heirs a *legal* remainder, thus making the heirs purchasers? Their not having done this certainly affords an argument in favour of the hypothesis suggested.

that a trust, *in a will* to settle land simply on A and the heirs of his body, authorises the Court to limit estates in strict settlement. The case of *Leonard* v. *Earl of Sussex*, it is true, had only the additional circumstance of a direction that it should not be in the power of A to dock the entail, with respect to which the writer fully concurs in the observation of a learned friend (*s*), 'that this rather weakened than strengthened the presumption, that the testator intended A to be merely tenant for life'; the direction seeming rather to import that A was to take an estate tail, without the power of docking it. The case, however, was decided, and has been since generally referred to, as standing upon this ground; and, it is to be observed also, that the case of *Seale* v. *Seale* (*t*) is a direct authority against applying the doctrine to the simple case suggested.

Whether a direction to settle on A for life, remainder to the heirs of his body, authorises a strict settlement.

"Indeed some Judges have denied its application even to the case of a direction to settle lands upon A *for life*, and, after his death to the heirs of his body. Such was the opinion expressed by Sir J. Jekyll in *Meure* v. *Meure* (*u*), and Sir W. Grant in *Blackburn* v. *Stables*, though the former decided that a different construction was to be given to the word 'issue,' and the latter, we have seen, was disposed to yield to a declaration that the estate should be *without impeachment of waste*, or that there should be a limitation *to trustees to preserve contingent remainders* (*x*). This distinction is certainly very refined. How can a testator intimate that he intends the object of the trust to be tenant for life more strongly than by expressly so limiting the estate? If the rule in *Shelley's Case* be objected as destroying that inference of intention, the answer is, that neither of the other circumstances to which this potency of operation is admitted to belong, prevents the application of that rule. In this respect they are all equally inoperative, though they all indicate an intention to confer an estate for life only. Even, therefore, if we hesitate to subscribe to the more general (though perhaps the more reasonable) doctrine, that a direction to settle authorises the Court to adopt its own mode of settlement, without regard to the particular force of the terms used by the testator, and requires *distinct indication of intention* that the testator did not mean that the legal effect of those terms should be followed,

(*s*) Hayes's Inq. 262, n.

(*t*) 1 P. W. 290, *ante*, p. 1833. See also *Sweetapple* v. *Bindon*, 2 Vern. 536; [*Harrison* v. *Naylor*, 2 Cox, 247; *Marryat* v. *Townly*, 1 Ves. Sen. 102; *Randall* v. *Daniel*, 24 Bea. 193.]

(*u*) 2 Atk. 265, *ante*, p. 1832; [*Bale* v. *Coleman*, 1 P. Wms. 142.]

[(*x*) *I.e.*, he relied on the absence of these *and other* clauses.]

yet even upon this principle the case under consideration would warrant the Court in moulding the limitations.

Affirmative established by *Bastard* v. *Proby*.

"In fact, the case of *Bastard* v. *Proby* (*y*) is a direct authority in favour of the affirmative. A testator devised lands to trustees, in trust to lay out the rents for the benefit of his daughter J. until twenty-one or marriage; and, on her attaining that age, directed that the trustees should, *as counsel should advise, convey, settle and assure* the lands unto or to the use of, or in trust for, the said J. *for her life*, and, after her death, then *on the heirs of her body* lawfully issuing; and Sir Ll. Kenyon, M.R., directed that conveyances should be executed limiting uses in strict settlement.

Observations upon *Blackburn* v. *Stables*.

"Where the testator, instead of employing technical terms, as in the cases just noticed, expresses himself in very brief informal language by directing *an entail to be made*, as in *Blackburn* v. *Stables*, and *Jervoise* v. *Duke of Northumberland*, it is useless to look for a specification of particulars, as that the devisee shall be tenant for life, etc.; the general indefinite nature of the testator's language forbids it: he may be supposed to have intended to exclude a strict interpretation by the use of terms the farthest removed from technicality, and which, in their popular sense, certainly mean something very different from placing the estate in the power of the first taker. No conveyancer receiving instructions for a settlement in these terms would hesitate to insert limitations in strict settlement; and the principle upon which Courts of Equity proceed in the execution of directory trusts is not very widely different. Considering Lord Eldon's determination, in *Jervoise* v. *Duke of Northumberland*, and more especially the doctrines advanced by him in his elaborate judgment in that case, it seems unsafe to rely on *Blackburn* v. *Stables*, to which it is extraordinary that his Lordship, in his comment upon the cases, makes no allusion" (*z*).

To be settled "on A and his heirs in strict entail."

Where lands are directed to be settled on A and his heirs *in strict entail*, there seems little doubt that A ought to be made tenant for life only (*a*).

(*y*) 2 Cox, 6.

(*z*) See further, as to executory trusts, Fea. C. R. 113; Prest. Est. 387; 1 Sand. Uses, 310; 1 Fonbl. Eq. 407, n.; Hayes's Inq. 264, where see strictures upon the observations of the other writers referred to. Lord Eldon, in *Jervoise* v. *Duke of Northumberland*, intimated his assent to the conclusions of Mr. Fearne on the subject of executory trusts, which is one of the many tributes of respect paid to the labours of this very eminent writer by those whose profound knowledge of the laws of real property enabled them to appreciate those labours. [See also *Stonor* v. *Curwen*, 5 Sim. 264; *Boswell* v. *Dillon*, 1 Dru. 291].

(*a*) *Graves* v. *Hicks*, 11 Sim. 536; *Woolmore* v. *Burrows*, 1 Sim., at p. 526.

In *Trevor* v. *Trevor* (*b*), a testator devised lands to trustees in trust to settle them to the use of G. R. for life, with remainder to his issue in tail male, in strict settlement, and in default of such issue over: it was held that the words "in tail male" did not exclude G. R.'s daughters.

Mere direction to convey does not make a trust executory.

"All trusts," said Lord St. Leonards (*c*), "are in a sense executory, because a trust cannot be executed, except by conveyance, and therefore there is something always to be done. But that is not the sense which a Court of Equity puts upon the term 'executory trusts.' A Court of Equity considers an executory trust as distinguished from a trust executing itself, and distinguishes the two in this manner:—Has the testator been what is called his own conveyancer? Has he left it to the Court to make out from general expressions what his intention is, or has he so defined that intention that you have nothing to do but to take the limitations he has given you, and to convert them into legal estates?"

Trust in terms partly direct and partly executory.

"It is clear," Mr. Jarman continues (*d*), "that where a testator devises real estate to trustees upon trusts, and then directs, that, in certain events they shall convey the estate in a prescribed manner, the fact that the will contains such a direction does not constitute a ground for regarding the whole series of trusts as executory, and for applying to the former that liberality of construction which is peculiar to trusts of this nature" (*e*).

The Court will not appoint protectors.

The Court will, of course, execute directions for any settlement that can legally be made, whether such directions are specific or general, provided the intention is apparent; but will not, in order to tie up the estate for a longer period than would be secured by making the first taker tenant for life with remainder to his sons successively in tail male, etc., appoint any persons protectors of the settlement (*f*).

Powers authorised by executory trust to settle.

It is beyond the scope of the present chapter to deal with the subject of carrying into effect executory trusts, except so far as it bears on the rule in *Shelley's Case*; but it may be convenient to refer to the cases on the question whether, in a settlement in pursuance of an executory trust, a tenant for life can be made dispunishable for waste; they are collected in

(*b*) 1 H. L. C. 239.

(*c*) *Egerton* v. *Brownlow*, 4 H. L. C. at p. 210; 23 L. J. Ch., at p. 406; 18 Jur., at p. 104; and see *East* v. *Twyford*, 9 Hare, at p. 733; *Herbert* v. *Blunden*, 1 D. & Wal., at p. 90; *Randall* v. *Daniel*, 24 Bea. 193; *Doncaster* v. *Doncaster*, 3 K. & J., at p. 35; *Fullerton* v. *Martin*, 1 Dr. & Sm. (personalty).

(*d*) First ed., Vol. II, p. 266.]

(*e*) *Franks* v. *Price*, 3 Bea. 182. [See also *Jackson* v. *Noble*, 2 Kee. 590; *Re Nelley's Trusts*, [1877] W. N. 120.

(*f*) *Bankes* v. *Le Despencer*, 11 Sim. 508; but see *Woolmore* v. *Burrows*, 1 Sim. 512.

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the footnote (*g*). The cases on the question what powers and provisions can be inserted in a settlement are referred to in Chapter XXIV (*h*).

Practical bearings of the rule in *Shelley's Case.*

As to lapse.

III.—Practical Effect of the Rule considered.—Mr. Jarman continues : " It may be useful, as supplementary to the preceding discussion of the Rule in *Shelley's Case*, to state, for the use of the student, the practical bearings of the alternative whether the heir takes by descent or by purchase; which will be best shown by suggesting a case of each kind. Suppose, then, a devise *to A* for life, remainder to the heirs of his body; and suppose another devise to the use of *trustees for the life of B*, in trust for B, remainder to the use of the heirs of his body. In the former case, the ancestor being tenant in tail, the *heirs* of his body *claim* derivatively through him by *descent per formam doni*, and, therefore, if A die in the lifetime of the testator, the heir [now takes as if the death of the ancestor had happened immediately after the death of the testator (*i*).]

" On the other hand, in the latter supposed case, if B should die in the testator's lifetime, it would not affect his heir, who claims, not derivatively through his ancestor, but originally in his own right by *purchase;* and who would, therefore, [even under the old law,] be entitled under the devise, notwithstanding his ancestor's death in the lifetime of the testator. The estate tail would go by a sort of quasi descent (*k*) through *all* the heirs of the body of the ancestor, first exhausting the inheritable issue of the first taker (and which issue would claim by descent), and then devolving upon the collateral lines; the head of each stock or line of issue claiming as heir of the body of the ancestor by purchase, but taking in the same manner as such heir would have done under an estate tail vested in the ancestor.

(*g*) The principle appears to be that where the executory trust is in such a form as would give the first taker an estate of inheritance, but the general object of the trust can only be effected by cutting down that estate to an estate for life, then such life estate is made unimpeachable for waste (*Leonard* v. *Earl of Sussex*, 2 Vern. 526; *White* v. *Briggs*, 15 Sim. 300; 2 Ph. 583; *Woolmore* v. *Burrows*, 1 Sim. 512; *Banks* v. *Le Despencer*, 11 Sim. 508; *Sackville-West* v. *Viscount Holmesdale*, L. R. 4 H. L. 543); but where a life estate is clearly given by the words of the executory trust, the Court will not make such life estate unimpeachable for waste (*Davenport* v. *Davenport*, 1 H. & M. 775; *Stanley* v. *Coulthurst*, L. R. 10 Eq. 259); *a fortiori* if the life estate is given to a woman for her separate use without power of anticipation (*Clive* v. *Clive*, L. R. 7 Ch. 433).

(*h*) *Ante*, p. 879 *et seq.*

(*i*) See 1 Vict. c. 26, s. 32. Under the old law the heir would have taken nothing, as the devise to his ancestor would have lapsed.] *Brett* v. *Rigden*, Plow. 340; *Hartopp's Case*, Cro. El. 243; *Hutton* v. *Simpson*, 2 Vern. 722; *Hodgson* v. *Ambrose*, Dougl. 337; 3 B. P. C. Toml. 416; *Wynn* v. *Wynn*, *ib.* 95; *Warner* v. *White*, *ib.* 435; [*Goodright* v. *Wright*, 1 P. W. 397; *Fuller* v. *Fuller*, Cro. El. 422.] The abstract prefixed to *Warner* v. *White* is singularly inaccurate.

(*k*) *Mandeville's Case*, Co. Lit. 26 *b*, *ante*, p. 1527. See Fea. C. R. 80.

As to dower and curtesy.

"Another difference to be observed is, that where the heir takes *by descent*, the property, if in possession, devolves upon him subject to the dower of the widow of his ancestor, if he were married at his death (*l*), . . . or subject to curtesy, if the ancestor were a married woman, who left a husband by whom she had issue born alive, *capable of inheriting*, and which attaches whether the estate be legal *or* equitable (*m*). On the other hand, where the heir takes by purchase, of course none of these rights, which are incident to estates of inheritance, attach, the ancestor being merely tenant *for life*.

Alienation by an enrolled conveyance.

"And, lastly, if the heir of the body take by descent, his claim may be defeated by the alienation of his ancestor by means of a conveyance enrolled, now substituted for a common recovery, the right to make which is, we have seen, an inseparable incident to an estate tail (*n*). On the other hand, the heir claiming by purchase is unaffected by the acts of his ancestor, except so far as those acts [might before the statute 8 & 9 Vict. c. 106, sect. 8,] have happened to destroy the contingent remainder of such heir, if not supported (as it always should [have been]) by a preceding vested estate of freehold. The conveyance, it should be observed, of a person becoming tenant in tail by force of the rule in *Shelley's Case*, under a limitation to the heirs of his body not *immediately* expectant on his estate for life, had no effect upon the mesne estates, unless they happened to be legal remainders contingent and unsupported. Thus, in the case of a limitation to A for life, remainder to his first and other sons in tail male, remainder to the heirs of the body of A, with remainders over; A, being tenant in tail by the operation of the rule, may make a disentailing assurance; but though such assurance will bar the remainders ulterior to the limitation to the heirs of his body, it will not affect the intervening estate of the first and other sons, unless there were no son born at the time, and no estate interposed to preserve the remainders of the sons, in which case such remainders, being contingent, would, [before the statute above referred to, have] clearly [been] destroyed.

Operation of disentailing assurance upon estates intervening between the freehold and the limitation to the heirs.

Farther points suggested.

"It may be useful to illustrate the practical consequences of a limitation of another description. Suppose a devise to A and B *jointly* for their lives remainder to the heirs of their bodies; if they were *not* husband and wife (or, it would seem,

[(*l*) It now makes no difference whether the estate be legal or equitable only, stat. 3 & 4 Will. 4, c. 105.

(*m*) Curtesy attaches to property saved from lapse by the 1 Vict. c. 26. s. 33, see *Eager* v. *Furnivall*, 17 Ch. D. 115. The same rule would apparently apply under section 32.]

(*n*) *Ante*, p. 1441.

persons who may lawfully marry), they would be *joint*-tenants for life, with *several* inheritances in tail (*o*). An enrolled conveyance by either would acquire the fee simple in an undivided moiety, and they would thenceforward be tenants in common: by parity of reason, a similar conveyance by both would comprise the entirety. If the limitation were to them *successively* for life, A would be tenant for life of the entirety, with the inheritance in tail in one moiety, subject, as to the latter, to B's estate for life, and B would be tenant for life in remainder of one moiety, and tenant in tail in remainder of the other moiety. A being tenant in tail in possession might make a disentailing assurance which would give him the fee-simple in a moiety of the inheritance, but would not, as before shown, affect B's estate for life in remainder in that moiety. B, on the other hand, having no immediate estate of freehold, could not during the life of A, and without his concurrence, acquire, by means of an enrolled conveyance, a larger estate than a base fee determinable on the failure of issue inheritable under the entail. A and B might conjointly convey the absolute fee-simple in the entirety.

"If under a devise to A and B jointly for their lives, with remainder to the heirs of their bodies, A and B were persons who might lawfully marry, they would be joint-tenants in tail; if actually husband and wife, they would be tenants in tail by entireties (*p*). In the former case, each might acquire the fee-simple in his or her own moiety, by making a disentailing assurance thereof; but, in the latter case, the concurrence of both would be essential, on the ground of the unity of person of husband and wife (*q*), and the deed of course must be acknowledged by the wife. In each of the suggested cases, if the estate remained unchanged at the decease of either of the two tenants in tail, it would devolve to the survivor, according to the well-known rule applicable as well to joint-tenancies as tenancies by entireties."

Abolition of the rule.

IV.—The New Law. Abolition of the Rule.—As we have already seen, the rule in *Shelley's Case* is abolished in the case of wills coming into operation after 1925 (*r*). Since the rule operated to defeat the intention expressed in the will, it is difficult to object to its abolition, but it may be pointed out that the rule had the advantage of vesting the property earlier than will be the

[(*o*) See Lit. s. 283; *Ex p. Tanner*, 20 Bea. 374.

(*p*) Co. Lit. 187 *b.*; but see *ante*, p. 1762 as to cases within the M. W. P. Act, 1882.

(*q*) See *Green* d. *Crew* v. *King*, 2 W. Bl. 1211.

(*r*) *Ante*, p. 1812, where section 131 of the Law of Property Act, 1925, is set out.]

case under the new law. A devise to A for life with remainder to his heirs gave him a fee simple. Now A will take an equitable estate for life with a contingent remainder to the person who at his death will be his heir. This, however, will not prevent dealings with the property because of the ample powers conferred on A as tenant for life by the Settled Land Act, 1925. The new rule is also a rule of law—apparently it could not be defeated by a definite statement that the testator intended the rule in *Shelley's Case* to apply to the devise. There is nothing, however, unreasonable in this, because if the testator intends A to take an estate of inheritance there is no sense in expressly giving a life interest to him.

CHAPTER XLIX (*a*).

WHAT WILL CONTROL THE WORDS "HEIRS OF THE BODY."

	PAGE		PAGE
I. *Superadded Words of Limitation*	1844	III. *Words of Limitation and Modification combined*	1855
II. *Words of Modification inconsistent with an Estate Tail*	1848	IV. *Effect of Clear Words of Explanation*	1857

Effect of context in controlling "heirs of the body."

I.—Superadded Words of Limitation.—Mr. Jarman says (*b*): "It has been already shown, that a devise to A and to the heirs of his body (*c*), or to A *for life*, and after his death, to the heirs of his body (*d*), vests in A an estate tail. On a devise couched in these simple terms, indeed, no question can arise; for wherever the contrary hypothesis has been contended for the argument for changing the construction of the words has been founded on some expressions *in the context*; as where words of limitation are superadded to the devise to the heirs of the body; the effect of which has been often agitated, and will here properly form the first point for inquiry.

Similar limitation superadded is inoperative.

"Where the superadded words amount to a mere repetition of *the preceding words of limitation*, they are, of course, inoperative to vary the construction. *Expressio eorum quæ tacite insunt nihil operatur.*

"Thus, in *Burnet* v. *Coby* (*e*), where a testator devised lands to A for life, and after his decease to the heirs male of the body of A, *and the heirs male of such issue male*, it was held, that A had an estate tail." The settled distinction was said to be that where, after a limitation to the ancestor, the word "heir" is in the singular number, and a limitation made to the issue of

(*a*) Since the rule in *Shelley's Case* is now abolished this Chapter only applies to wills which came into operation before 1926. Additions to Mr. Jarman's notes are in square brackets.

(*b*) First ed., Vol. II, p. 271.

(*c*) *Ante*, p. 1800.

(*d*) *Ante*, p. 1815.

(*e*) 1 Barn. K. B. 367. See also *Shelley's Case*, 1 Rep. 93; [*Minshull* v. *Minshull*, 1 Atk. 411;] *Legatt* v. *Sewell*, 2 Vern. 551; 1 Eq. Ca. Ab. 394, pl. 7; 1 P. W. 87, cit. 2 Ves. Sen. 657, where the trust was *executory*, and would, it is clear, according to the doctrine now established, be executed by a strict settlement. See *ante*, p. 1828.

such heir, the word heir is considered as a word of purchase (*f*), and a *descriptio personæ*; but wherever the word "heirs" is in the plural number, and a limitation made to the issue of such heirs, the word heirs is considered as a word of descent and not of purchase (*g*).

Construction not varied by superadded limitation to *heirs general* of heirs of the body.

"It is also well established," continues Mr. Jarman, "that a limitation to the *heirs general* of the heirs of the body, is equally ineffectual to turn the latter into words of purchase.

"Thus, in the case of *Goodright* d. *Lisle* v. *Pullyn* (*h*), where a testator devised lands to N. for life, and, after his decease, then he devised the same unto *the heirs male of the body* of N., lawfully to be begotten, *and his heirs for ever*; but if N. should happen to die without such heir male, then over; the Court was of opinion, that the devise vested an estate tail in N. A similar decision was made by the Privy Council on a similar devise (*i*).

Wright v. *Pearson.*

"So, in *Wright* v. *Pearson* (*k*), where the devise was to R. and his assigns for his life, remainder to trustees to support contingent remainders, remainder to the use of *the heirs male of the body* of R., lawfully to be begotten, *and their heirs*; provided that in case R. should die without leaving any issue male of his body living *at his death*, then the testator subjected the premises to certain charges (*l*), and, in default of such issue male of R., he devised the premises to certain grandchildren, or such of them as should be living at the time of the failure of issue of R.; Lord Keeper Henley held it to be an estate tail in R.

"Again, in *Denn* d. *Geering* v. *Shenton* (*m*), where the testator devised lands to S. to hold to him and *the heirs of his body* lawfully to be begotten, *and their heirs for ever*, chargeable with an annuity to M. for life; but in case S. should die without leaving issue of his body, then the testator devised the lands to W. and his heirs, chargeable as aforesaid, and also subject to the payment of £100 to A. *within one year after W. or his heirs should become possessed of the premises.* It was contended, on the authority of *Doe* v. *Laming* (*n*), that the

[(*f*) See *ante*, p. 1803.

(*g*) See *Pelham Clinton* v. *Duke of Newcastle*, [1905] A. C. 111, where the limitation was to the issue male of A and their male descendants.]

(*h*) 2 Ld. Raym. 1437; 2 Stra. 729.

(*i*) *Morris* d. *Andrews* v. *Le Gay*, noticed 2 Burr. p. 1102, and 2 Atk. p. 249, and more fully and somewhat differently stated *sub nom. Morris* v. *Ward*, by Lord Kenyon, 8 T. R. p. 518.

(*k*) 1 Ed. 119; Amb. 358; Fea. C. R. 126, where the case is very fully commented on. See also *Alpass* v. *Watkins*, 8 T. R. 516.

[(*l*) The Lord Keeper read these words as in a parenthesis.]

(*m*) Cowp. 410. See also *Alpass* v. *Watkins*, 8 T. R. 516.

(*n*) 2 Burr. 1100. [In *Denn* v. *Shenton*, as also in *Wright* v. *Pearson*, the gift over was much relied on.]

words *heirs of the body* might be words of purchase, with these superadded words of limitation, and that this construction was much strengthened by the circumstance of the legacy of £100, which must have referred to a dying without issue at the death, and not to an indefinite failure of issue, which might happen a hundred years thence. But Lord Mansfield and the rest of the Court of King's Bench held it to be a clear estate tail in S.

"Even if the devise over had been made in express terms to depend on the prior devisee leaving no issue *at the time of his death*, this would not, according to the case of *Wright* v. *Pearson* (*o*), have prevented the *prior* devisee taking an estate tail.

"So, in *Measure* v. *Gee* (*p*), where the devise was to J. for his life, remainder to trustees to preserve contingent remainders, and, after the decease of J., the testator devised the premises to *the heirs of the body* of J., lawfully to be begotten, *his, her and their heirs and assigns for ever*; but in case there should be a failure of issue of J. lawfully to be begotten, then over. It was contended, that the early cases on this subject had been shaken by modern decisions; but the Court of King's Bench considered them to be irrelevant (*q*), and held that the devise vested an estate tail in J.

Nor by interposition of estate to preserve contingent remainders.

"This case, as well as *Wright* v. *Pearson*, shows that the interposition of trustees to preserve contingent remainders is inoperative to invest superadded words of limitation with any controlling efficacy.

"The next case in order is *Kinch* v. *Ward* (*r*), where a testator devised freehold and leasehold lands to trustees, in trust to permit his son T. to receive the rents for his life, and, after his decease, the testator devised the same to *the heirs of the body* of his said son lawfully begotten, *their heirs, executors, administrators, and assigns for ever*; but in case he should die without issue, then over. It was assumed, in the discussion of another question, that the devise of the freehold lands vested in T. an estate tail.

As to heirs of the body being directed to assume testator's name.

"And it is clear that the circumstance of the heirs of the body being directed to assume the testator's name does not constitute a ground for varying the construction, although the

(*o*) *Ante*, p. 1845.

(*p*) 5 B. & Ald. 910. See also *King* v. *Burchell*, 1 Ed. 424; *Denn* v. *Puckey*, 5 T. R. 299; *Frank* v. *Stovin*, 3 East, 548, where the word was *issue*, as to which see *post*, p. 1900.

(*q*) The only case cited in *Measure* v. *Gee*, which afforded a shadow of opposition to the principle of the cases in the text, was *Doe* v. *Goff*, 11 East, 668, which had other circumstances, and has been, as we shall presently see, itself overruled by the highest authority.

(*r*) 2 S. & St. 409.

effect is, by enabling the ancestor to acquire the fee-simple, to place within his power the means of rendering the injunction nugatory (*s*); this being, in fact, merely one of the consequences which a testator does not usually intend or foresee, when he employs words that, in legal construction, make the first taker tenant in tail, and which consequences, whether apprehended or not, do not authorise the testator's judicial expositor to divert his bounty into another channel, by giving to his language a strained construction, which would make it apply to a different class of objects (*t*).

Nash v. *Coates.*

"Thus, in the case of *Nash* v. [*Coates*] (*u*), where a testator devised lands to trustees and the survivor of them and the heirs of such survivor, in trust for F. W., then an infant, till he should arrive at the age of twenty-one years, upon his legally taking and using the testator's surname; and then, upon his attaining such age, and taking that name, habendum to him for life; and *from and after his decease*, to hold to the trustees and the survivor of them, and the heirs of such survivor, to preserve contingent remainders, in trust for the *heirs male* [*of the body*] *of F. W.*, taking the testator's name, *and the heirs and assigns of such male issue for ever;* but in default of such male issue, then over. It was held that the trustees did not take the legal estate in the lands devised (*x*), but that F. W. had a legal estate tail in them on his coming of age and adopting the testator's surname.

Result of the cases.

"Down to the very latest period, then, we have a confirmation, if confirmation were wanted, of the inadequacy of words of limitation in fee, annexed to *heirs of the body*, to control their operation. The only remarks suggested by the later decisions is an expression of surprise that adjudication should be deemed necessary on a point so clearly settled by anterior decisions; and our surprise is greatly increased, when, in such a state of the authorities, we find a distinguished Judge attempting to found a distinction between the two cases, on the mere existence in one, and the absence in the other, of superadded words of limitation (*y*).

(*s*) Such a condition, too, if imposed on a person taking an estate tail by purchase, would (unless made a condition precedent) be liable to be defeated by an enrolled conveyance, which, like a common recovery destroys all estates limited in defeasance of, as well as those which are made to take effect after, the determination of, the estate tail.

[(*t*) *Per* Lord Kingsdown, *Atkinson* v. *Holtby*, 10 H. L. C., at p. 332.]

(*u*) 3 B. & Ad. 839. [See also *Toller* v. *Attwood*, 15 Q. B. 929, *post*, p. 1855].

(*x*) See *ante*, p. 1818.

(*y*) See judgment of Bayley, J., in *Doe* d. *Bosnall* v. *Harvey*, 4 B. & Cr., at p. 623, [and of Sugden, C., in *Montgomery* v. *Montgomery*, 3 Jo. & Lat., at p. 52; and see observations on the latter case, by Lord Macnaghten in *Van Grutten* v. *Foxwell*, [1897] A. C., at p. 673.]

Distinction where the words of limitation change the course of descent.

"But it seems that if the superadded words of limitation *operate to change the course of descent*, they will convert the words on which they are engrafted into words of purchase; as in the case of a devise to a man for life, remainder to his *heirs* and the *heirs female* of their bodies (*z*). And the same principle of course would apply where a limitation to the heirs *male* of the body is annexed to a limitation to the heirs *female*, and vice versa; but the books contain no such case, and the doctrine rests entirely on the position arguendo of Anderson in *Shelley's Case*, which, however, has been since much cited and recognised.

Position of Mr. Preston examined.

"An eminent writer has laid it down (*a*), 'that as often as the superadded words are included in, and do *not* in their extent *exceed* the preceding words, but the words *heirs, etc.*, in the several parts of the gift are in terms, or at least in construction, of equal extent, the latter words are surplusage, and the preceding words, as connected with the limitation to the ancestor, will be taken to be words of limitation.'

"The position, that the preceding words are words of limitation where the superadded words do *not* exceed them, seems to be the reverse of the established rule (*b*); the very case put by Anderson as an instance of their being words of purchase is one in which the superadded words *narrowed* the preceding words; and, on the other hand, we have seen that in all the cases in which the superadded words have been held to be inoperative they have been either equal to, or more extensive than, the words of limitation upon which they were engrafted" (*c*).

Effect of superadded words of modification inconsistent with an estate tail.

II.—Words of Modification inconsistent with an Estate Tail.—"We next proceed to inquire as to the effect of coupling a limitation to *heirs of the body* with words of modification importing that they are to take concurrently, or distributively, or in some other manner inconsistent with the course of devolution under an estate tail, as by the addition of the words '*share and share alike*,' or '*as tenants in common*,' or '*whether sons or daughters*,' or '*without regard to seniority of age or priority of birth*.' In such cases, the great struggle has been to determine whether the superadded words are to be treated as

(*z*) *Per* Anderson, in *Shelley's Case*, 1 Rep. 95 b.

(*a*) 1 Preston on Estates, p. 353.

[(*b*) And see Fea. C. R. p. 183. But see *Hamilton* v. *West*, 10 Ir. Eq. Rep. 75, stated *post*, pp. 1901-2. It would almost seem that Mr. Jarman must have misunderstood Mr. Preston, and that the latter meant by "exceed," exceed in *particularity*; otherwise, the subsequent use of the words "equal extent" are not very intelligible. By an excess of particularity, or, in other words, by adding to the description, the class is narrowed. Both writers would thus appear to be in substantial agreement on this question.]

(*c*) See *ante*, p. 1845.

explanatory of the testator's intention to use the term *heirs of the body* in some other sense, and as descriptive of another class of objects, or are to be rejected as repugnant to the estate which those words properly and technically create. It will be seen, by an examination of the following cases, that, after much conflicting decision and opinion, the latter doctrine has prevailed, and it seems to stand on the soundest principles of construction. Those principles were violated, it is conceived, in permitting words of a clear and ascertained signification to be cut down by expressions from which an intention equally definite could not be collected. The inconsistent clause shows only that the testator intended the heirs of the body to take in a manner in which, as such, they could not take; not that persons other than heirs were meant to be the objects. To make expressions of this nature the ground of such an interpretation is to sacrifice the main scope of the devise to its details. The Courts have, therefore, wisely rejected the construction which reads heirs of the body with such a context as meaning *children*, and thereby restricts the testator's bounty to a narrower range of objects; for, it will be observed, that although children are included in heirs of the body, yet the converse of the proposition does not hold, for an estate tail is capable of transmission through a long line of objects whom a gift to the children would never reach (as grandchildren and more remote descendants); to say nothing of the difference in the *order* of its devolution.

Expressions superadded to the limitation "to heirs of the body."

"This rule of construction is supported by a series of decisions, commencing from an early period, and sufficiently numerous and authoritative to outweigh any opposing decision and dicta which can be adduced.

"Thus, in the case of *Doe* d. *Candler* v. *Smith* (*d*), where a testator devised his freehold lands to his daughter A., and *the heirs of her body* lawfully to be begotten, for ever, *as tenants in common, and not as joint-tenants*; and in case his said daughter should happen to die before twenty-one, or without having issue on her body lawfully begotten, then over; Lord Kenyon and the other Judges of the Court of King's Bench held that the daughter took an estate tail.

"For ever as tenants in common, and not as joint-tenants."

"So, in *Pierson* v. *Vickers* (*e*), where a testator devised his

"Whether sons or daughters, as tenants in common," etc.

(*d*) 7 T. R. 531. It should be stated that the reader will not find in this and some of the other cases of the same class any distinct recognition of the principle stated in the text; but as that principle is sanctioned by the later cases, and affords a more intelligible and definite guide than the doctrine of general and particular intention on which some of these decisions proceed, the writer has felt himself authorised to rest them on the former ground. An able and extended examination of most of the cases stated in this chapter may be found in Mr. Hayes's "Inquiry."

(*e*) 5 East, 548. [See *Grimson* v. *Downing*, 4 Drew. 125, where the estate to A was expressly for life.]

estates at B unto his daughter A, and to the heirs of her body lawfully to be begotten, *whether sons or daughters, as tenants in common, and not as joint-tenants;* and in default of such issue, over; Lord Ellenborough and the other Judges of the Court of King's Bench, held, on the authority of the last case, and *Doe* v. *Cooper* (*f*), that the daughter took an estate tail.

"Again, in the case of *Bennett* v. *Earl of Tankerville* (*g*), where the devise was to the use of A and his assigns for his life without impeachment of waste, and, after his decease, to *the heirs of his body, to take as tenants in common and not as joint-tenants;* and in case of his decease without issue of his body, then over; Sir W. Grant, M.R., held that the devisee took an estate tail.

In such shares, etc., as F. should appoint.

"So, in *Doe* d. *Cole* v. *Goldsmith* (*h*) where a testator devised his lands to his son F. to hold to him and his assigns for his natural life, and immediately after his decease the testator devised the same unto the heirs of his body lawfully to be begotten, in such *parts, shares, and proportions, manner and form, as F. should by will or deed devise or appoint,* and, in default of such heirs of his body lawfully to be begotten, then *immediately after his decease* the testator devised the premises over to another son, J., in fee. It was held by the Court of Common Pleas, that F. took an estate tail. Gibbs, C.J., observed that it was the testator's evident intent that the estate should not go over to J. until all the 'heirs of the body' of F. were extinct.

Observations.

"In this and several of the preceding cases, much stress was laid on the words 'in default of issue,' or 'in default of heirs of the body,' occurring in the devise over, or rather in the clause introducing such devise, as demonstrating a 'general intent' that the estate was not to go over until a general failure of issue of the first taker; but it is difficult to understand how this intention could be rendered more distinctly and unequivocally apparent by such referential language than by an *express* devise to these very objects [*viz.*, 'heirs of the body'].

In such shares as W. should appoint, *and if but one child*, etc.

"We now proceed to the important case of *Jesson* v. *Wright* (*i*), which was as follows. A testator devised to W. certain real estate for the term of his natural life, he keeping the buildings in tenantable repair; and after W.'s decease devised the same to the *heirs of the body of W.* lawfully issuing, *in such*

(*f*) 1 East, 229.
(*g*) 19 Ves. 170.
(*h*) 7 Taunt. 209; 2 Marsh. 517.
(*i*) 2 Bligh, 1; from which the statement of the will is here taken. ["The only touchstone one can use in trying to separate the true metal from the dross is the ruling in *Jesson* v. *Wright*": *per* Lord Macnaghten, [1897] A. C., at p. 673. See *Bridge* v. *Chapman*, Notes of Cases Law Journal, 1875, 118.]

Jesson v. *Wright.*

Doe v. *Jesson* in K. B.; reversed in D. P.

Lord Eldon's observations.

shares and proportions *as W.* by deed or will *should appoint*, and for want of such appointment, then to *the heirs of the body of W. lawfully issuing, share and share alike, as tenants in common*, and if but one *child*, the whole to such only *child;* and for want of *such* issue, then over. It was held by the Court of King's Bench that W. took an estate for life only, with remainder to his children for life as tenants in common. A writ of error was brought in the House of Lords, which Court, after a very full argument, *reversed* the decision. Lord Eldon observed : 'It is definitely settled, as a rule of law, that where there is a particular and a general or paramount intent, the latter shall prevail, and Courts are bound to give effect to the paramount intent (*k*). The decision of the Court below has proceeded upon the notion that no such paramount intent was to be found in the will.' His lordship then read the devise, observing, that if he stopped at the end of the first devise to W., it was clear that he was to take for life only; if at the end of the first following words, 'lawfully issuing,' he would, notwithstanding the express estate for life, be tenant in tail : 'and in order to cut down this estate,' continued his lordship, 'it is absolutely necessary that a particular intent should be found to control and alter it, as clear as the general intent here expressed. The words "heirs of the body" will indeed yield to a particular intent that the estate shall be only for life, and that may be from the effect of superadded words, or any expressions showing the particular intent of the testator, *but that must be clearly intelligible and unequivocal.* The will then proceeds, "in such shares and proportions as he the said W. shall by deed, etc., appoint." Heirs of the body mean one person at any given time, but they comprehend all the posterity of the donee in succession. W. therefore could not strictly and technically appoint to heirs of the body. This is the power, and then come the words of limitation over in default of execution of the power,—"and for want of such gift, etc., then to the heirs of the body, etc., share and share alike, as tenants in common." It has been powerfully argued (and no case was ever better argued at this bar), that the appointment could not be to all the heirs of the body in succession for ever, and, therefore, that it must mean a person, or class of persons, to take by purchase; that the descendants in all time to come could not be tenants

(*k*) By "general intent" Lord Eldon must be understood to mean an intent to include heirs of the body in the gift. It is submitted that those parts of the judgment in which he refers to the uncontrolled force of the words *heirs of the body* contain a more satisfactory explanation of the principle than these passages. Lord Redesdale, it will be seen, strenuously insists upon this being the true ground of the decision. [See [1897] A. C., at p. 672 and at p. 684.]

in common; that "heirs of the body," in this part of the will, must mean the same class of persons as the "heirs of the body" among whom he had before given the power to appoint; and, inasmuch as you here find a child described as an heir of the body, you are therefore to conclude that heirs of the body mean nothing but children. Against such a construction many difficulties have been raised on the other side; as, for instance, how the children should take in certain events, as where some of the children should be born and die before others come into being. How is this limitation, in default of appointment in such case, to be construed and applied? The defendants in error contend, upon the construction of the words in the power, and the limitation in default of appointment, that the words "heirs of the body" mean some particular class of persons within the general description of heirs of the body; and it was further strongly insisted that it must be children, because in the concluding clause of the limitation in default of appointment the whole estate is given to one *child*, if there should be only one. Their construction is, that the testator gives the estate to W. for life, and to the children as tenants in common for life. How they could so take, in many of the cases put on the other side, it is difficult to settle. Children are included undoubtedly in heirs of the body; and if there had been but one child, he would have been heir of the body, and his issue would have been heirs of the body; but *because children are included in the words "heirs of the body," it does not follow that heirs of the body must mean only children*, where you can find upon the will a more general intent comprehending more objects (*l*). Then the words "*for want of such issue*," which follow, it is said, mean for want of children; because the word *such* is referential, and the word *child* occurs in the limitation immediately preceding. On the other hand it is argued, that heirs of the body, being the general description of those who are to take, and the words "share and share alike as tenants in common," being words upon which it is difficult to put any reasonable construction, children would be merely objects included in the description, and so would an only child. The limitation, "if but one child, then to such only child," being, as they say, the description of an individual who would be comprehended in the terms "heirs of the body," "for want of such issue," they conclude, *must mean for want of heirs of the body*. If the words "children" and "child" are so to be considered as merely within the meaning of the words *heirs of the body*, which words

[(*l*) See a similar clause similarly treated in *Dunk* v. *Fenner*, 2 R. & My., at p. 566.]

Jesson v. *Wright.*

comprehend them and other objects of the testator's bounty, (and I do not see what right I have to restrict the meaning of the word *issue* (*m*),) there is an end of the question.'

Lord Redesdale.

"Lord Redesdale said: 'There is such a variety of combination in words, that it has the effect of puzzling those who are to decide upon the construction of wills. It is therefore necessary to establish rules, and important to uphold them, that those who have to advise may be able to give opinions on titles with safety. From the variety and nicety of distinction in the cases, it is difficult for a professional adviser to say what is the estate of a person claiming under a will. It cannot at this day be argued that, because the testator uses in one part of his will words having a clear meaning in law, and in another part other words inconsistent with the former, that the first words are to be cancelled or overthrown. In *Coulson* v. *Coulson* (*n*), it is clear that the testator did not mean to give an estate tail to the parent. If he meant anything by the interposition of trustees to support contingent remainders, it was clearly his intent to give the parent an estate for life only. It is dangerous, where words have a fixed legal effect, to suffer them to be controlled without some clear expression or necessary implication. In this case it is argued that the testator did not mean to use the words "heirs of the body" in their ordinary legal sense, because there are other inconsistent words; but it only follows that he was ignorant of the effect of the one or of the other. All the cases but *Doe* v. *Goff* (*o*) decide that the latter words, unless they contain a clear expression or a necessary implication of some intent contrary to the legal import of the former, are to be rejected. *That the general intent should overrule the particular, is not the most accurate expression of the principle of decision. The rule is, that technical words shall have their legal effect unless from subsequent inconsistent words it is very clear that the testator meant otherwise.* In many cases,—in all, I believe, except *Doe* v. *Goff* (*p*)—it has been held that the words "*tenants in common*" do not overrule the legal sense of words of settled meaning. In other cases a similar power of appointment has been held not to overrule the meaning and effect of similar words. It has been argued, that heirs of the body cannot take as tenants in

Lord Redesdale's statement of the principle of the decision.

(*m*) But these words, it is submitted, derive all their force from the terms of the preceding devise, having in themselves no independent operation whatever; for it is settled that the words "in default of such issue," preceded by a gift to children, refer to those objects. See *R.* v. *Marquis of Stafford*, 7 East, 521; *Doe* d. *Tooley* v. *Gunniss*, 4 Taunt. 313; and other cases stated *post*.

(*n*) 2 Stra. 1125.

(*o*) 11 East, 668.

(*p*) But see cases *infra*.

common; *but it does not follow that the testator did not intend that heirs of the body should take, because they cannot take in the mode prescribed.* This only follows, that having given to heirs of the body, he could not modify that gift in the two different ways which he desired, and *the words of modification are to be rejected.* Those who decide upon such cases ought not to rely on petty distinctions, which only mislead parties, but look to the words used in the will. The words "for want of *such* issue" are far from being sufficient to overrule the words "heirs of the body" (*q*). They have almost constantly been construed to mean an indefinite failure of issue, and of themselves have frequently been held to give an estate tail. In this case the words "such issue" cannot be construed children, except by referring to the words "heirs of the body," and in referring to those words they show another intent. The defendants in error interpret "heirs of the body" to mean children only, and then they say the limitation over is in default of children; but I see no ground to restrict the words "heirs of the body" to mean children in this will.'

Effect of limitation to preserve contingent remainders.

"So in *Doe* d. *Bosnall* v. *Harvey* (*r*), where a testator devised his real *estate*, subject to his debts and legacies, to T. for the term of his natural life, and after the determination of that estate, to A and B and their heirs, during the life of T. to preserve contingent remainders; and after the decease of T. the testator devised the same to and among all and every *the heirs of the body of T., as well female as male, lawfully to be begotten, such heirs, as well female as male, to take as tenants in common, and not as joint-tenants*; and for default of such issue, over. The lands were gavelkind. It was held that T. took an estate tail; Abbott, C.J., observing,—'that though the heirs could not take by descent *as tenants in common*, but would be coparceners, yet it was not to be inferred because they could not take in the particular mode prescribed by the testator, that therefore they were not to take at all.'

"As well female as male to take as tenants in common," etc.

"Equally to be divided amongst them, share and share alike."

"Again, in the case of *Doe* d. *Atkinson* v. *Featherstone* (*s*), where a testator devised to J., and E. his wife, for the term of their natural lives, and for the life of the longer liver of them, and after the decease of the survivor, he devised to *the heirs of the body of E.* by J. already begotten or to be begotten, to *be equally divided amongst them, share and share alike.*" There

(*q*) It could not for a moment be contended that these words *overruled heirs* of the body. The argument was, that if those words, as used in the preceding devise, meant *children* (but which his Lordship shows incontrovertibly they did not), then the words "for want of such issue" meant for want of such *children*. See *ante*, p. 1853, n. (*m*).

(*r*) 4 B. & Cr. 610.

(*s*) 1 B. & Ad. 944.

was no gift over. It was held, on the authority of *Jesson* v. *Wright*, that E. took an estate tail, and not (as had been contended) an estate for life, with remainder to the children of E. and J.

Devise of "estate" to heirs of the body, "share and share alike."

And in *Grimson* v. *Downing* (*t*), where the testator devised "the said *estate*" to A for life with remainder "to the heirs of his body lawfully begotten for ever equally, share and share alike, sons and daughters, but if A should die without heirs or heir," then over, Sir R. Kindersley, V.-C., held that A took an estate tail.

Some doubt was for a time cast on the scope of the decision in *Jesson* v. *Wright* by the observations of Sir E. Sugden in *Montgomery* v. *Montgomery* (*u*), but this doubt has now been entirely removed by the opinions of Lords Macnaghten and Davey in *Van Grutten* v. *Foxwell* (*x*), "and the question now in every case must be whether the expression requiring exposition, be it 'heirs' or 'heirs of the body,' or any other expression which may have the like meaning, is used as the designation of a particular individual or a particular class of objects, or whether, on the other hand, it includes the whole line of succession capable of inheriting" (*y*).

III.—Words of Limitation and of Modification combined.—Nor will words of limitation to the heirs general, in addition to words of inconsistent modification, avail to convert "heirs of the body" into words of purchase.

"Heirs male who shall live to attain twenty-one . . . and his heirs."

Thus, in *Toller* v. *Attwood* (*z*), there was a devise to the use of E., a married woman, for her separate use for life, with remainder to trustees to preserve contingent remainders, with remainder to the use of the heirs male of the body of E. to be begotten, *who shall live to attain the age of twenty-one years, and to his heirs and assigns for ever;* but in default of such heirs male, or there being such, he or they should die before he or either of them should attain the age of twenty-one years without lawful issue, then over. It was held by the Court of Q. B. that the words, "who shall live, etc.," could not restrict the force of the previous limitation, and that E. took an estate tail, citing the rule as distinctly and emphatically laid down in *Jesson* v. *Wright*, that technical words should have their legal effect unless from subsequent inconsistent words it was very clear that the testator meant otherwise; and in this case the

[(*t*) 4 Drew. 125. See also *Anderson* v. *Anderson*, 30 Bea. 209.
(*u*) 3 Jo. & Lat. 47.
(*x*) [1897] A. C. 658.
(*y*) *Per* Lord Macnaghten, [1897] A. C., at p. 677.
(*z*) 15 Q. B. 929. The trustees were held to take the fee, *ante*, p. 1784.

form of the gift over rather favouring the conclusion of an estate tail in E., than of a limitation by purchase to her sons. The Court did not advert to the form of the limitation being "to *his* heirs and assigns," as showing that one person only was intended to take at one time as heir of the body, and as strengthening the conclusion that "heirs of the body" must be held to be words of limitation in order to let in all the issue (*a*).

The clause in *Toller* v. *Attwood* which required "heirs" to be of full age (*b*), was no less inconsistent with a devolution by inheritance than one that would make them tenants in common. But actual decision is not wanting on a clause of the latter kind in combination with superadded words of limitation.

"Heirs of the body and their heirs as tenants in common."

Thus, in *Mills* v. *Seward* (*c*), where a testator devised his real estate to A for life without impeachment of waste, with remainder to the heirs of the body of A habendum to such heirs and his, her or their heirs and assigns for ever as tenants in common; and if A should die under twenty-one, but should leave heirs of his body surviving, then to such heirs of A and his, her and their heirs and assigns for ever in like manner; but in case A should die without leaving any such heirs of the body him surviving, then over. It was held by Sir. W. P. Wood, V.-C., that neither the words importing a tenancy in common nor the superadded words of limitation were sufficient to deprive the words "heirs of the body" of their proper meaning. It was argued that in the gift over on the death of A under twenty-one "heirs of his body" must mean children (since in that event he could not leave issue more remote), and that the same construction must be given to the words in the previous clause. But the V.-C. said that the fact that children would be included among the heirs of the body did not make the phrase signify children exclusively. He therefore held that the rule in *Shelley's Case* applied, and that A was tenant in tail.

Observations.

Mr. Jarman continues (*d*), "The preceding cases present many shades of difference, but they *all* concur in establishing

(*a*) See Chap. LI, *post*, p. 1905.

(*b*) See similar modification in *Jack* v. *Featherston*, 9 Bli. (N.S.) 237; *post*, p. 1862.

(*c*) 1 J. & H. 733. In *Montgomery* v. *Montgomery*, 3 Jo. & Lat., at p. 55, Lord St. Leonards said *Doe* v. *Jesson* only decided that "heirs of the body" should operate as words of limitation where otherwise the issue would not take estates of inheritance. But as to this Wood, V.-C., observed that, in the case before Lord St. Leonards the word "issue" was used, and that (except *Right* v. *Creber*, 5 B. & C. 866, which he referred to a different ground) there was not a single decision to be found where the words "heirs of the body" had been read as words of purchase, on the single ground that they were followed by "and their heirs and assigns." See also *per* Kindersley, V.-C., 4 Drew., at p. 133.

(*d*) First ed., Vol. II, p. 286.

the principle, that words of inconsistent modification engrafted on a limitation to heirs of the body are to be rejected." Every case, therefore, in so far as it is inconsistent with the principles laid down by the House of Lords in *Jesson* v. *Wright* (*e*), *Roddy* v. *Fitzgerald* (*f*), and *Van Grutten* v. *Foxwell* (*g*), must be considered overruled. Such cases are *Doe* d. *Brown* v. *Holme* (*h*), *Doe* d. *Long* v. *Laming* (*i*), *Doe* d. *Hallen* v. *Ironmonger* (*k*), *Doe* d. *Strong* v. *Goff* (*l*), *Crump* d. *Woolley* v. *Norwood* (*m*), *Gretton* v. *Haward* (*n*), *Wilcox* v. *Bellaers* (*o*), and *Right* d. *Shortridge* v. *Creber* (*p*), all of which are discussed by Mr. Jarman.

No distinction made where there is a direction to convey.

It may be observed, in conclusion of this Section, that a different construction will not necessarily be put upon limitations by way of trust expressed in words such as those now under consideration, merely because the trust is a trust to convey and not a direct trust (*q*).

Effect of clear words of explanation annexed to heirs of the body.

IV.—Effect of Clear Words of Explanation.—"But," continues Mr. Jarman (*r*), "it is not to be inferred from the preceding cases that the words, *heirs of the body*, are incapable of control or explanation by the effect of superadded expressions, clearly demonstrating that the testator used those words in some other than their ordinary acceptation, and as descriptive of another class of objects. The rule established by those cases only requires a clear indication of intention to this effect. Where the words in question are accompanied by such an explanatory context, the devise is to be read as if the terms which they are explained to mean were actually inserted in the will (*s*).

Lowe v. *Davies*.

"Accordingly, in *Lowe* or *Lawe* v. *Davies* (*t*), where a testator devised to B. and his heirs lawfully to be begotten,

(*e*) 2 Bli. 1.
(*f*) 6 H. L. C., at p. 881.
(*g*) [1897] A. C. 658.
(*h*) 3 Wils. pp. 237, 241; 2 W. Bl. 777.
(*i*) 2 Burr. 1100. This case was critically overruled by *Doe* d. *Bosnall* v. *Harvey*, 4 B. & Cr. 610; see Lord Brougham's opinion: *Fetherston* v. *Fetherston*, 3 Cl. & F. 67.
(*k*) 3 East, 533.
(*l*) 11 East, 668.
(*m*) 7 Taunt. 362; 2 Marsh. 161.
(*n*) 6 Taunt. 94; 2 Marsh. 9.
(*o*) Hayes's Inquiry, p. 1.
(*p*) 5 B. & Cr. 866.
(*q*) *Marryat* v. *Townly*, 1 Ves. Sen. 102.
(*r*) First ed., Vol. II, p. 300.
(*s*) "The testator may conceivably show by the context that he has used the words 'heirs,' or 'heirs of the body,' or 'issue,' in some limited or restricted sense of his own, which is not the legal meaning of the words, *e.g.*, he may have used the words in the sense of children, or as designating some individual person who would be heir of the body at the time of the death of the tenant for life, or at some other particular time": *per* Lord Davey, [1897] A. C. p. 685.]
(*t*) 2 Ld. Ray. 1561; 2 Stra. 849; 1 Barn. B. R. 238.

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Heirs, "that is to say," etc.

'that is to say, to his first, second, third, and every other son and sons successively, lawfully to be begotten of the body of the said B., and the heirs of the body of such first, second, etc.,' it was held that B. took but an estate for life; for the subsequent clause was explanatory of what 'heirs' meant.

Lisle v. *Gray*. "Heirs male of the body," explained to mean *sons*.

"So, in the case of *Lisle* v. *Gray* (*u*), where real estate was [limited by deed to the use of E. for life, remainder] to the use of the first son of the body of E. and the heirs male of the body of such first son, and for default of such issue, to the use of the second son of the body of E. and the heirs male of the body of such second son (similar limitations were carried on to the fourth son), 'and *so* to all and every other the *heirs male of the body* of E. respectively and successively, and to the heirs male of their body, according to seniority of age.' There was a power to raise portions out of the land if E. died without issue male. It was held that E. took only an estate for life; the words 'and so,' etc., showing that the words 'heirs male' in the latter clause meant *sons*, by relation to the preceding [limitation].

Goodtitle v. *Herring*.

Same construction.

"Again, in the case of *Goodtitle* d. *Sweet* v. *Herring* (*x*), where the devise was to A for life, remainder to trustees to preserve contingent remainders, remainder to the *heirs male* of the body of A to be begotten severally, successively, and in remainder one after another, as they and every of them should be in seniority of age and priority of birth, *the elder of such sons* and the heirs male of his body lawfully issuing, being always to be preferred to *the younger of such sons*, and the heirs male of his and their body and bodies; and for default of such issue, to the *daughters*, as tenants in common, and the heirs of their bodies. The Court held that the testatrix had, by the words 'the elder of *such sons*,' etc., explained herself by 'heirs of the body' to mean *sons*, so that A took only an estate for life."

North v. *Martin*. "Heirs of body" held to mean children.

So, in *North* v. *Martin* (*y*), where by a marriage settlement lands were conveyed to the use of A, the intended husband, for life, with remainder to trustees to preserve contingent remainders, with remainder to B, the intended wife, for life, and after the decease of the survivor, to the use of the heirs of the body of A on the body of B to be begotten and their

(*u*) 2 Lev. 223; T. Jo. 114; T. Ray. pp. 278, 315, [affirmed in Ex. Ch. Pollex. 582, cit. 1 P. W. 90; 2 Burr. 1109, not, as erroneously stated in Jo. & Ray., reversed;] see also Hayes's Inq. 81.

(*x*) 1 East, 264, [affirmed in D. P., see 3 B. & P. p. 628;] see also *Mandeville* v. *Lackey*, 3 Ridg. P. C. 352, *post*, p. 1908. As to the expression, "heirs male *now living*," see *Burchett* v. *Durdant*, 2 Vent. 311; Carth. 154. For some other instances of the same kind, see *ante*, p. 1536.

(*y*) 6 Sim. 266.

heirs, and if more children than one, equally to be divided among them, to take as tenants in common, and in default of such issue, then over. It was contended that, according to the authorities, particularly *Wright* v. *Jesson*, A was tenant in tail by force of the limitation to the heirs of his body; but Sir L. Shadwell, V.-C., held that the words "and if more children than one," were interpretative of those words, observing that no case had been cited, nor did he recollect any in which the words "heirs of the body" had been held to create an estate tail, where those words of interpretation had been used; and he added (and the remark is deserving of attention), that this did away with the effect of the argument founded on the limitation over for default of such issue, which must be construed for default of such children.

Doe v. *Woodall.*

Heirs of body "in manner aforesaid," explained by preceding limitations.

Again, in *Doe* d. *Woodall* v. *Woodall* (z), there was a devise to the testator's four grandchildren for their lives as tenants in common, with remainder as to the share of which each was tenant for life to his or her first and only sons successively in tail, with remainder to his or her daughters as tenants in common in tail, with cross remainders in tail between the daughters; and then the testator proceeded, "in case either of my said grandchildren shall happen to die leaving no issue behind him, her or them, then my will and meaning is that all and singular the premises herein lastly devised shall go and remain to the survivor of them and the heirs of his or her body lawfully to be begotten *in manner aforesaid*." It was contended that, under the last clause, a surviving grandchild took an estate tail in the share of a grandchild who left no issue; but the Court of C. B. held that the limitation to the "heirs of his or her body" was explained by the words "in manner aforesaid" to mean a limitation to the first and other sons successively in tail, with remainder to the daughters as tenants in common in tail, as in the preceding limitations, and that the surviving grandchild therefore took only an estate for life.

Gummoe v. *Howes.*

Heirs of the body explained to mean children.

In *Gummoe* v. *Howes* (a), the devise was upon trust for A and B equally for life, and in case of the death of either of them without issue, the part or share of her so dying to go to the survivor of them, but if either of them should depart this life leaving issue, then the part or share of her so dying to go to her children in equal proportions if more than one, and if but one, then to such only *child*; and after the death of both A and B, the testator directed his trustees to convey, assign and transfer the property to the heirs of the body of A and

[(z) 3 C. B. 349; and see *Green* v. *Green*, 3 De G. & S. 480.
(a) 23 Bea. 184.

lawfully begotten, share and share alike, or to the survivor or survivors of them if more than one, and if but one, then to such only *child* when and as often as he, she or they should attain his, her or their respective age or ages of twenty-one years; and the will contained a devise over on the death of A and B without issue. Sir J. Romilly, M.R., held that the words "heirs of the body" were interpreted to mean "children," and that A and B took estates for life only.

Jordan v. *Adams.*

Heirs male of the body held to mean sons, by mention of "their father."

And in *Jordan* v. *Adams* (*b*), where a testator devised lands to W. T. for life, and after his decease "to the heirs male of his body for their several lives in succession according to their respective seniorities, or in such parts, shares and proportions, manner and form, and amongst them as the said W. T. *their father* should appoint. And in default of such issue male of W. T.," over. It was held by the Court of C. B. that the testator had here shown that by heirs male of the body he meant sons, for in case of an appointment the appointor must stand in the relation of "father" to the appointees. In delivering the judgment of the Court, Erle, C.J., allowed greater weight than was warranted by *Jesson* v. *Wright* to the words of modification contained in the devise: but Williams, J., declared his concurrence with the rest solely on the ground of the use of the words "their father." On appeal to the Exchequer Chamber that Court was equally divided: and the two Judges who agreed with the decision below did so only on the ground taken by Williams, J.; Cockburn, C.J., one of them, declaring that the authorities forbad them to ascribe to the words of modification the effect claimed for them.

Remark on preceding cases.

Mr. Jarman continues (*c*), "In all the preceding cases it will be seen that the testator had annexed to the term 'heirs of the body' words of explanation, which left no doubt of his having used the expression as synonymous with *sons*. These cases, therefore, may be supported, without impugning the general principle, as stated by Lord Alvanley in the case of *Poole* v. *Poole* (*d*), that the Courts will not deviate from the rule which gives an estate tail to the first taker, if the will contains a limitation to the heirs of his body, except where the intent of the testator *appears so plainly to the contrary that nobody can misunderstand it*; for the will in these cases

(*b*) 6 C. B. (N.S.) 748; 9 *ib.* 483. It is remarkable that no reference was made to *Shaw* v. *Weigh*, 2 Str. 798, stated *post*, p. 1894, where, notwithstanding the word "mother" occurring in similar relation to "*issue*," the latter word was held a word of limitation. See also *Re Score*, 57 L. T. 40.

(*c*) First ed., Vol. II, p. 302.]

(*d*) 3 B. & P., at p. 627. There is a striking similarity between the general scope of Lord Alvanley's reasoning here and that of Lords Eldon and Redesdale in *Jesson* v. *Wright*, *ante*, pp. 1851 *seq.*

seemed to supply the clear incontrovertible evidence of intention required by such a statement of the doctrine.

"On the other hand, in the case of *Jones* v. *Morgan* (*e*), it was decided, and that in perfect consistency with the principle of the cases just stated, that a devise to W. for life, without impeachment of waste, and after his decease to the use of the heirs male of the body of W. lawfully begotten, *severally, respectively, and in remainder, the one after the other, as they and every of them shall be in seniority of age and priority of birth*, gave W. an estate tail. Lord Thurlow said, 'Where the estate is so given that it is to go to every person who can claim as heir to the first taker, the word *heirs* must be a word of limitation. All heirs taking *as heirs* must take by descent.'

Heirs male of the body, "severally, respectively, and in remainder, the one after the other."

"So, in *Poole* v. *Poole* (*f*), where a testator devised all his real estate to the use of trustees, in trust for his first son during his life, and also upon trust to preserve contingent remainders, and after his decease in trust for the several *heirs male of such son lawfully issuing*, so that the elder of *such sons* and the heirs male of his body should always take before the younger and the heirs male of his body, remainder to the second, third, fourth, and other son and sons of the testator for their respective lives, and also upon trust to preserve, remainder in trust for the several heirs male of their bodies lawfully issuing, so as the elder of such sons and the heirs male of his body should take before the younger of such sons and the heirs male of his body, remainder to his first and every other daughter for their lives, and upon trust to preserve, remainder to the several heirs male of their respective bodies, so that the elder of such daughters and the heirs male of her body should always be preferred to the younger of such daughters and the heirs male of her and their body and bodies. The testator then charged the estates with certain portions, and devised them, in failure of such issue by him as aforesaid, but not otherwise, upon trust for his nephew A. for life, and upon trust to preserve, remainder in trust for the first and other son and sons of A., as they should be in seniority of age and priority of birth, and the several heirs of their respective bodies lawfully issuing, so that the eldest of such sons and the heirs of his body should be preferred to the younger of the same sons and the heirs of his and their body and bodies. The question was, whether the eldest son of the testator took an estate for life or in tail; in other words, whether the testator had not explained himself by the words 'heirs male of the body' in that devise to mean *sons*, by

Poole v. *Poole*.

"Such sons" construed such *heirs male* upon the effect of the whole will.

(*e*) 1 B. C. C. 206.
(*f*) 3 B. & P. 620.

declaring that the elder of '*such sons*' should be preferred to the younger. Lord Alvanley, and the rest of the Court of Common Pleas, expressly avoiding an intimation of what their opinion would have been if that clause had stood alone in the will, held that, in connection with the devise to the other sons, the daughters, and the nephew, the son took an estate tail.

Remarks upon *Poole* v. *Poole*.

"In this case the context certainly much assisted the construction adopted by the Court, for as the other sons of the testator, as well as his daughters, took successive estates tail, it was scarcely supposable that he could intend the first son to have only an estate for life. To have made such a difference between the sons would have violated the general plan of the will. The clause which gave rise to the question, although applied properly enough in a subsequent part of the will to the devise to the other sons of the testator, was redundant in the position which it here occupied, where its insertion was evidently an error.

To W. and to his heirs male, the elder son surviving and the heirs male of his body always to be preferred, etc.

"Again, in the case of *Jack* v. *Fetherston* (*g*), where the words of devise were :—'I give, etc., to W., and to his heirs male, according to their seniority in age, on their respectively attaining the age of twenty-one years, all my estates real and personal, in lands, houses, and tenements, not hereinbefore disposed of, *the elder son surviving of the said W. and the heirs male of his body lawfully begotten, always to be preferred to the second or younger son*; and in case of the failure of issue male in the said W. surviving him, or their dying unmarried and without lawful issue male attaining the age of twenty-one years, then to T., (brother of the said W.,) and his heirs male lawfully begotten on attaining the age of twenty-one years, the elder to be preferred to the younger; and in case of the death or failure of the issue male of the said T. lawfully begotten, and their not attaining the age of twenty-one years, then to my right heirs for ever.' The House of Lords held, that W. took an estate tail male. Lord C.J. Tindal declared the unanimous opinion of the Judges to be, that the present case was governed by the rule laid down by Lord Alvanley, in *Poole* v. *Poole*, 'that the first taker shall be held to have an estate tail where the devise to him is followed by a limitation to him and the heirs of his body, except where the intent of the testator has appeared so plainly to the contrary that no one could misunderstand it.' Here the subsequent words were not wholly incompatible with an estate tail. If W. took an estate tail, the elder son surviving and the heirs male of his body would be preferred to the second

(*g*) 9 Bligh. (N.S.) 237, [3 Cl. & Fin. 67 (*Fetherston* v. *Fetherston*), Sug. Law of Prop. 254.]

or the younger son, and any difficulty created by the words referring to the majority of the devisees occurred equally whether the estate tail was in W. or in his sons.

"By contrasting *Lowe* v. *Davies* and *Lisle* v. *Gray* with *Jones* v. *Morgan*, and *Goodtitle* v. *Herring* with *Poole* v. *Poole* and *Jack* v. *Fetherston*, the limits of the doctrine of the respective cases will be perceived.

Declaration that devise to heirs of the body was intended to be *in strict settlement.*

"In further confirmation of the doctrine that the words 'heirs of the body,' are not controlled by expressions of an equivocal import, may be cited the case of *Douglas* v. *Congreve* (*h*), where a testator devised real estate to A for life, and after his decease to the *heirs of his body*, and so on to several other persons by way of remainder in like manner, and then declared that all the aforesaid limitations were intended by him to be *in strict settlement*, with remainder to his own right heirs for ever; and the Court of C. P. certified an opinion that these ambiguous words did not prevent the devisees from taking estates tail under the prior words of devise; which certificate was afterwards confirmed by Lord Langdale, M.R., who observed, 'In the present case there is no executory trust. It is a case of direct devise of the legal estate, and in terms which, according to the rules of law, give an estate tail to the plaintiff; and it does not appear to me that the words "in strict settlement" can have the legal effect of altering that estate. An executory trust would have admitted greater latitude of interpretation, and the effect of the words might have been different.'"

(*h*) 5 Scott, 223; 4 Bing. N. C. 1; 1 Bea. 59.

CHAPTER L.

RULE IN WILD'S CASE BEFORE 1926 (*a*).

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I. *Rule in Wild's Case* 1864

II. "*Child*," "*Son*," "*Daughter*," *etc., where used as nomina collectiva* 1876

III. *Abolition of the Rule* 1886

Children, where a word of limitation.

Rule in *Wild's Case*.

1. When no child at the time of the devise.

I.—Rule in Wild's Case.—Mr. Jarman states the rule (or rather the first branch of the rule) thus (*b*): "The rule of construction commonly referred to as the doctrine of *Wild's Case* (*c*), is this: that where lands are devised to a person and *his children, and he has no child at the time of the devise*, the parent takes an estate tail; for it is said, 'the intent of the devisor is manifest and certain that the children (or issues) should take, and as immediate devisees they cannot take, because they are not *in rerum natura*, and by way of remainder they cannot take, for that was not his (the devisor's) intent, for the gift is immediate; therefore such words shall be taken as words of limitation.' In support of this position, a case is referred to, as reported by Serjeant Bendloes (*d*), in which the devise was to husband and wife, 'and to the men children of their bodies begotten,' and it did not appear that they had any issue male at the time of the devise, and therefore it was adjudged that they had an *estate tail* to them and the heirs male of their bodies. The principle has been followed in several subsequent cases.

(*a*) Since the rule is now abolished the greater part of this chapter only applies to the wills of persons who died before 1926.

(*b*) First ed., Vol. II, p. 307. As to the second branch, see *post*, p. 1869. As to devises to "sons," see *post*, p. 1876.

(*c*) 6 Rep. 16 b; *S. C.*, *Anon.*, Gouldsb. 139, pl. 47; *S. C.*, *nom. Richardson* v. *Yardley*, Moore, 397, pl. 519. The words of the rule are "children or issue." But as to "issue" see Chap. LI. The rule (which is not stated in Gouldsb. or Moore) is distinct from the point *decided* in *Wild's Case*, which arose on a devise to A and his wife, and after their decease to their children. And see *Doe* d. *Tooley* v. *Gunniss*, 4 Taunt. 313; *Doe* d. *Liversage* v. *Vaughan*, 5 B. & Ald. 464; *Beauchant* v. *Usticke*, [1880] W. N. 14.

(*d*) 1 Bulstr. 219; Bendl. 30.

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To S. *and his child or children* for ever.

"Thus, in *Davie* v. *Stevens* (*e*), where a testator devised to his son S., when he should accomplish the full age of twenty-one years, the fee simple and inheritance of Lower Shelstone, *to him and his child or children* for ever, but if he should happen to die before twenty-one, then over to testator's wife for ever. S. was unmarried at the death of the testator, and it was held that he took an estate tail, *there being no children to take an immediate estate by purchase*. The meaning, Lord Mansfield said, was the same as if the expression had been 'to S. and his heirs, that is to say, his children or his issue.' The words 'for ever' made no difference, for the heirs (of the body) of S. might last for ever (*f*).

To J. *and his children* lawfully to be begotten.

"So, in the case of *Seale* v. *Barter* (*g*), where the devise was in these words, 'It is my will that all my lands and estates shall after my decease come to my son J., *and his children* lawfully to be begotten, with full power for him to settle the same or any part or parts thereof by will or otherwise on them, or any of them, as he shall think proper, and for default of such issue, then' over in like manner to a daughter. J. had no child at

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(*e*) Dougl. 321. "*Wharton* v. *Gresham*, 2 W. Bl. 1083, is generally classed with these cases; but as the devise was to J. W. and his sons *in tail male*, it is clear that he took an estate tail without construing 'sons' as a word of limitation; and the only consequence of the non-existence of a son was his exclusion from taking immediately under the devise." (Note by Mr. Jarman.)

Observations upon *Hodges* v. *Middleton*.

(*f*) "In *Hodges* v. *Middleton*, Dougl. 431, Lord Mansfield and the Court of King's Bench inclined to think that where a testator devised to A. for life, and after her death to *her children*, upon condition that she or they constantly paid £30 a year for a clergyman to officiate in her chapel, and on failure thereof testator's own next heirs, and in case of failure of children of A., then to her brother G., &c., A. had an estate tail; or that, if she took an estate for life, the children took an estate tail; and as recoveries had been suffered by both, the alternative of these propositions was not material. As the limitation to the children in this case was by way of remainder, there seems to have been no ground, whether a child existed at the date of the will or not, for holding the parent to be tenant in tail. It is as difficult to perceive any satisfactory reason for giving the children estates tail. The direction to pay £30 a year would have enlarged their devise to a fee simple. See *supra*, p. 1784." (Note by Mr. Jarman.)

(*g*) "2 B. & P. 485; but see *Doe* d. *Davy* v. *Burnsall*, 6 T. R. 30; *S. C.*, *nom. Burnsall* v. *Davy*, 1 B. & P. 215; *Doe* d. *Gilman* v. *Elvey*, 4 East, 313, *post*, where it seems to have been taken for granted that under a devise to A. and his issue [where the issue were tenants in common in fee,] the issue took by way of remainder; and it is observable that in the case of *Heron* v. *Stokes*, 2 D. & War., at p. 107, Sir Edward Sugden suggested that the more natural construction of a gift to one and his children, *there being no children in esse at the time*, and that which he should have adopted in the absence of authority the other way, would be to hold it to be a gift to the parent for life, with remainder to the children. These remarks do not show that this eminent Judge considered that the authorities would have left him free to adopt such a construction, if the point had called for decision. He would doubtless have felt himself bound to follow, in regard to real estate, the often-recognised rule in *Wild's Case*, either with or without the modification suggested. With respect to personalty, perhaps, the authorities would not be found to present so formidable an obstacle to the adoption of the doctrine of the Irish Chancellor." (Note by Mr. Jarman.) *Vide*, *post*, p. 1873.

the date of the will, [but had a daughter living at the testator's death (*h*).] The Court of Common Pleas, on the authority of *Wild's Case*, *Wharton* v. *Gresham*, and several other cases (which the writer has referred to other grounds, as they did not involve the inquiry whether the devisee had children or not at the time), held that J. took an estate tail, the Chief Justice (Lord Alvanley) expressly intimating that the Court gave no opinion as to what would have been the construction if there had been children born at the time of the devise.

Devise in remainder to B. and to his children lawfully begotten for ever.

"Again, in the recent case of *Broadhurst* v. *Morris* (*i*), where the testator devised all his share of his two estates in W. to his daughter E. for life, and at her decease to F., her husband, during his life; and at the decease of his said son-in-law F. he directed that the whole legacy to him should go to his (testator's) grandson, B., *and to his children, lawfully begotten for ever*; but, in default of such issue *at his decease*, then over. B. was unmarried at the death of the testator. It was contended that the words 'at his decease' distinguished the present case from the previous authorities; and it was also suggested that, by the effect of the words 'for ever' the children might take the fee; but the Court of K.B. certified (the case being from Chancery) that the devise conferred an estate tail on B.

"Thus, the cases have established, it should seem, that a devise to a man and his children, he having none at the time of the devise, gives him an estate tail.

Suggested modification of the terms of the rule.

"*The time of the devise* appears to denote rather the period of the *making* of the will, than the time of its *taking effect* (*k*), and yet it is impossible not to see that the material period in regard to the evident design of the rule, is the death of the testator, when the will takes effect.

"The object of the rule manifestly is, that the testator's intention in favour of children shall not *in any event* be frustrated; but if it be applied only in case of there being no child living at the time of the making of the will, the accident intended to be so carefully guarded against may occur. For suppose there should happen to be a child or children at that time, who should subsequently die in the testator's lifetime, so that no child was living at his death; in this case, though there was no child to take jointly with the parent, yet the rule would not be applied in favour of after-born children. On the other hand, in the converse case, namely, that of there being a child at the death, but not at the date of the will, an estate tail would be created,

(*h*) See 2 B. & P. 485.
(*i*) 2 B. & Ad. 1. See also *Clifford* v. *Koe*, 5 A. C. 447.
(*k*) See acc. *Seale* v. *Barter*, stated above; and *per* Malins, V.-C., *Grieve* v. *Grieve*, 36 L. J. Ch., at p. 934.

though there was a child competent to take by purchase, so that the ground upon which that construction has been resorted to did not exist. Indeed, [if the will is not within the Wills Act] a still more absurd consequence [may follow] from an adherence to the literal terms of this rule of construction in the latter case; for suppose there is no child at the making of the will, but a child subsequently comes into existence, who survives the testator, and the parent does not, the devise would fail altogether, notwithstanding the existence of a child at the death of the testator, if it were held that the parent would have been tenant in tail (*l*). These circumstances actually occurred in *Buffar* v. *Bradford* (*m*), where a testator in a certain event gave real and personal estate to A *and the children born of her body* (*n*). A having died in the testator's lifetime, leaving a child, who was born after the making of the will, *when A had no child*, it was contended, on the authority of *Wild's Case*, that the devise had lapsed; but Lord Hardwicke held the child to be entitled. His lordship said, 'It must be allowed that children in their natural import are words of purchase, and not of limitation, unless it is to comply with the intention of the testator, *where the words cannot take effect in any other way*.'

Buffar v. *Bradford*.

"If the literal terms of the rule in *Wild's Case* can be departed from in the manner suggested, in order to give effect to *its spirit*, it would seem to follow that the parent would never be held to take an estate tail if there were a child, who, according to the established rules of construction, could have taken jointly with the parent. Consequently, if the devise were future, so that all children coming *in esse* before the period of vesting in possession would be entitled (*o*), the rule which makes the parent tenant in tail would (if at all) only come into operation in the absence of any *such objects*. In the case of *Broadhurst* v. *Morris* (*p*), the rule seems to have been applied to a devise of this description, but this peculiarity in the case does not appear to have attracted attention, and it must be confessed that, in reference to cases of every class, the modification of the doctrine suggested in the preceding remarks has to encounter the objection, that it makes the construction of the devise depend upon subsequent events, and therefore its adoption is not too hastily to be assumed."

Application of the rule to future devises.

(*l*) But now see section 32 of the Wills Act. (*m*) 2 Atk. 220.

(*n*) "In some of the early cases, an absurd distinction is taken between a gift to children and a gift to children *of the body*, as if the latter more strongly pointed to an estate tail. Even Lord Hale seriously advanced it in *King* v. *Melling*, 1 Vent. 225. This is indeed 'spelling a will out by little hints.' See same judgment, at p. 230." (Note by Mr. Jarman.)

(*o*) *Ante*, p. 1642.

(*p*) *Ante*, p. 1866; and see *Scott* v. *Scott*, 15 Sim. 47.

CHAPTER L.

Rule excluded by context.

Lord Hardwicke's decision in *Buffar* v. *Bradford* (*q*) is not to be understood as depending on any such modification of the rule. He refused to apply the rule in that case, because the context showed that it would disappoint the intention. The gift was to the testator's sister during her widowhood; then the property was to be valued and divided into eight parts, four of which the testator gave to A and the children born of her body; but if any part should be thought too highly valued, "such part shall, when the time of possession comes, go to A and her children, because they will have then four of the eight parts." A having died in the testator's lifetime, leaving a child who was born after the date of the will, when A had no child, it was contended, on the authority of *Wild's Case*, that the devise had lapsed. But Lord Hardwicke held the child to be entitled. He said, "It is the time of possession in the present case which takes it out of the reasoning in *Wild's Case*; for here A and her children are to have four eighths, and are to take at the same time as joint-tenants. . . . The child, being born in the lifetime of the testator, would have taken with his mother as joint-tenants, if she had lived; as she is dead he shall take the whole by way of remainder." This, as pointed out by Lord Cranworth (*r*), is "a conclusion founded, not on the notion that there could be a varying interpretation of the will according to circumstances which might happen after it was made, but on its evident meaning when it was made." So, in *Sparling* v. *Parker* (*s*), where the gift was of personalty to be laid out in land "to A and to his first and other sons after him in the usual mode of succession," it was held by Romilly, M.R., that A (who was a bachelor) took an estate for his life only.

In *Re Buckmaster's Estate* (*t*) real estate was devised to A and B, "share and share alike, and, in their respective proportions, to their children, or according to their wills." Kay, J., considered that the rule in *Wild's Case* did not apply, and held that A and B took the fee as tenants in common, with an executory devise over at the death of each of them to his children, if any, or to his devisees.

(*q*) 2 Atk. 220.

(*r*) 10 H. L. C., at p 180. See also *per* Wood, V.-C., 2 K. & J., at p. 674. Lord Cranworth treated the gift as entitling all children born before the death or marriage of testator's sister, and this would seem to be according to the rule as now established.

(*s*) 29 Bea. 450. And in *Grieve* v. *Grieve*, L. R. 4 Eq. 180, testatrix gave a house to her two nieces (then spinsters), "and to their children, and if they have not any," over; "the furniture to go with the house." The gift of the furniture was held by Malins, V.-C., to show that the nieces were not intended to take estates tail in the house.

(*t*) 47 L. T. 514.

Rule in *Wild's Case.*

2. When there are children at the time of the devise.

Mr. Jarman goes on to state the second branch of the rule (*u*) : "It has been hitherto treated as an undeniable position that, in the devises under consideration, children, if there be any, will take jointly with their parent by purchase; and such certainly is the resolution in *Wild's Case*, as reported in Coke (*x*), who lays it down—'If a man devise land to A *and to his children or issue*, and *they* then have issue of *their* bodies, there his express intent may take effect according to the rule of the common law, and no manifest and certain intent appears in the will to the contrary : and therefore, in such case, they shall have but a joint estate for life.'

"And in conformity to this doctrine seems to be the case of *Oates* d. *Hatterley* v. *Jackson* (*y*), where a testator devised to his wife J. for his life, and after her decease to his daughter B. *and her children* on her body begotten or to be begotten by W. her husband *and their heirs* for ever. B. had one child at the date of the will, and afterwards others; and it was held that she took jointly with them an estate in fee, and consequently that on their deaths (which had happened) she became entitled to the entirety in fee. This, it will be observed, was the case of a devise *in fee*.

To A and her children, and their heirs.

"But in the more recent case of *Jeffery* v. *Honywood* (*z*), where a testator gave certain estates, subject to charges, to A, and to all and every the *child and children*, whether male or female, of her body lawfully issuing, and *unto his, her, and their heirs or assigns for ever, as tenants in common.* A died in the lifetime of the testator, leaving ten children. (It is not expressly stated whether any of the children were living at the date of the will, but it seems probable that this was the case.) The question was, whether A took an estate in fee in an eleventh share, the consequence of which would be that it lapsed by her death in the testator's lifetime. The affirmative was contended for on the authority of *Oates* v. *Jackson*; but Sir John Leach, V.-C., held that A had a life estate only; he said, 'There are two gifts, one to the mother, without words of limitation superadded, and another to her children, their heirs and assigns; and these two gifts can only be rendered sensible by construing, as the words import, a life estate to the mother, and a *remainder in fee* to the children. In *Oates* v. *Jackson* the mother was, by the plain force of the expression, comprehended in the limitation in fee.'

Children held to take by way of remainder.

(*u*) First ed., Vol. II, p. 312.

(*x*) 6 Rep. 16 b. The plural "they" and "their" appears to be used by mistake.

(*y*) 2 Stra. 1172. See also *Buffar* v. *Bradford*, 2 Atk. 220; *Caffary* v. *Caffary*, 8 Jur. 329.

(*z*) 4 Mad. 398. See also *Newman* v. *Nightingale*, 1 Cox, 341, stated *ante*, p. 1287.

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Observations upon *Jeffery* v. *Honywood*.

"The difference of expression, however, in the two cases is extremely slight. In *Jeffery* v. *Honeywood*, the gift is 'to A and *to* all and every the child and children.' In *Oates* v. *Jackson*, 'to A and her children.' The only difference consists in the word 'to,' and, according to the report of the latter case in Modern Reports (*a*), even this slight difference is extinguished, the expression there being 'to B and *to* the children of her body' (*b*).

"Even supposing the words of the limitation not to apply to the mother, (in which case, however, it might have been contended that she took the fee by force of the word 'estates,') it is difficult to see upon what ground the devise to the children could be held to be *a remainder* expectant on the mother's estate, and not to be immediate or in possession as to all the objects. His Honor's objection to the latter construction is, that 'after-born children would be included in this devise, and it is a singular intention to impute to a father, that he means his daughter's personal interest in an estate should continually diminish upon the birth of a new child.' But, according to all the authorities (*c*), including a decision of the Vice-Chancellor himself (*d*), an *immediate* gift *to children vests exclusively in the objects living at the death of the testator.*

"The case of *Jeffery* v. *Honywood* seems to be inconsistent with and must therefore be considered as overruled by the case of *Broadhurst* v. *Morris* (*e*) already stated. It is true that the former case was cited with seeming approbation in the case of *Bowen* v. *Scowcroft* (*f*) by Mr. Baron Alderson, who founded the latter decision mainly on its authority; but the cases are, it is submitted, distinguishable."

"Children" held to be a word of limitation, notwithstanding the existence of children.

The second branch of the rule will not, any more than the first, be applied where it would defeat the intention as shown by the context. To give effect to the intention so manifested the Courts would, before 1926, construe "children" a word of limitation, notwithstanding the existence of children. Thus, in

(*a*) 7 Mod. 439.

(*b*) "It has been justly remarked, however, by a recent writer, that the substitution of the words 'his, her, and their' for the simple 'their' of *Oates* v. *Jackson*, showed the testator's idea that it was probable [*qu.* possible] that only one, and that either male or female, might become entitled to his bounty; whereas, if he had intended the mother to take as tenant in common in fee, in no case would the estate have gone to one male. Prior on Construction of Issue, &c., pl. 54." (Note by Mr. Jarman.) See also *Re Moyle's Estate*, 1 L. R. Ir. 155 ("to M. and *to* any child, &c.").

(*c*) *Heathe* v. *Heathe*, 2 Atk. 121; *Singleton* v. *Singleton*, 1 B. C. C. 542, n., and other cases *cited* ante, p. 1639.

(*d*) *Scott* v. *Harwood*, 5 Mad. 332.

(*e*) 2 B. & Ad. 1. See acc. *per* Wood, V.-C., 2 K. & J., at p. 673, and *Cormack* v. *Copous*, 17 Bea., at p. 403.

(*f*) 2 Y. & C. 640, referred to *post*, p. 2087.

Wood v. *Baron* (*g*), where a testator devised to his daughter his whole estate and effects, real and personal, who should hold and enjoy the same as a place of inheritance to her and her children, or her issue, for ever; and if his daughter should die leaving no child or children, or if her children should die without issue, then over. It was held that the daughter took an estate tail, though she had issue at the time of the making of the will, and of the death of the testator.

Devise to A as a "place of inheritance to her and her children, or her issue."

So in *Webb* v. *Byng* (*h*), where the testatrix, Anne Cranmer, devised as follows:—"I give in trust to my executors for my niece Mary Anne Byng and her children all my Q. estates, provided she takes the name of *Cranmer* and arms, and her children, with my mansion house, plate, books, linen, etc., Archbishop Cranmer's portrait by Holbein," and other articles "as heirlooms with my estate": there were children of Mary Anne Byng *in esse* at the date of the will and at the death of testatrix; but it was held by Wood, V.-C., that Mary Anne Byng took an estate tail. She and her children could not take concurrently; since that would involve this manifest absurdity, *viz.*, that they must all live together in the same house and enjoy the various articles given as heirlooms with the estate. And the object of the testatrix being to perpetuate the name of Cranmer, she could not have intended that Mary Ann Byng should take for life, with remainder to her eight children as joint-tenants in fee; because then, independently of the fact that *Jeffery* v. *Honywood* had been overruled by *Broadhurst* v. *Morris*, the estate would by that construction be divisible into eight separate estates, and as the parties to take the property were also to take the name and arms, the result would be to found as many small families all bearing the name and arms of Cranmer, whereas the testatrix spoke of her estate as one and indivisible and to be enjoyed in its entirety.

Devise to A and her children of mansion house with articles as heirlooms.

So a devise of the testator's "property to A and to his children in succession" has been held to give A an estate tail although he had children at the date of the will (*i*). And a devise "to my daughter A to her and her children for ever," she being with child at the date of the will, was held to make A tenant in tail on the ground that the words "to her" would be surplusage if the words "and her children" were words of purchase and not of limitation. "To her," etc., was read as

"To A and his children in succession."

"To A, to her and her children."

(*g*) 1 East, 259.

(*h*) 2 K. & J. 669; affirmed 8 D. M. & G. 633, and 10 H. L. C. 171 (*Byng* v. *Byng*).

(*i*) *Earl of Tyrone* v. *Marquis of Waterford*, 1 D. F. & J. 613. See *Re Childe*, [1883] W. N. 48 ("eldest and other sons in succession"). *Studdert* v. *Von Steiglitz*, 23 L. R. Ir. 564; *Re Pennefather*, [1896] 1 Ir. R. 249.

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the tenendum defining what estate A was to take by the previous devise (*k*).

Mr. Jarman continues (*l*): "In *Seale* v. *Barter* (*m*), Lord Alvanley observed that according to the report of *Wild's Case* in Moore (*n*), two of the Judges thought it was an estate tail in him, though there were children at the time of the devise; but probably it did not occur to his Lordship that the devise in that case was to A and his wife, and *after their death*, to their children, which it is now admitted on all hands gives an estate for life to the parents, with remainder to their children; so that the notion as to its being an estate tail was clearly untenable (*o*). Had the observation been applied to a devise to A and his children simply, it might have had more weight.

Rule whether applicable to *bequests* of personalty.

"The word 'children' seems to have been construed as a word of limitation (in a very obscure will) in the case of *Doe* d. *Gigg* v. *Bradley* (*p*), where a testator bequeathed a *leasehold* property to A and B for life, share and share alike, with survivorship for life to A, and after their decease to the children of A, 'to be equally divided between them, share and share alike, and to the survivor of them *and their children*'; it was held that these words were words of limitation, applicable to the gift to the children, (though there were children of such children living at the death of the testator (*q*)), and accordingly it was to be construed as a gift to the children absolutely (*r*), with survivorship between them for *life* (*s*).

Rule not applicable to personal estate.

"This case has too much of peculiarity to authorise any general conclusion. Lord Hardwicke, in *Buffar* v. *Bradford* (*t*), seems to have been averse to the application of the rule in *Wild's Case* to personal estate, where, he said, the effect of

(*k*) *Roper* v. *Roper*, 36 L. J. C. P. 270, and in Ex. Ch., L. R. 3 C. P. 32. It was doubted by Kelly, C.B., in this case, whether a child *en ventre* could be considered *in esse* within the rule (as to which *vide*, *ante*, p. 1677); and, if it could, whether one child would satisfy the word "children" in the plural; but see *Oates* d. *Hatterley* v. *Jackson*, 2 Str. 1172.

(*l*) First ed., Vol. II, p. 315.

(*m*) 2 B. & P. 485, *ante*, p. 1865.

(*n*) 397, pl. 519, *nom. Richardson* v. *Yardley*.

(*o*) See also his Lordship's observations upon *Hodges* v. *Middleton*, stated *ante*, in *Seale* v. *Barter*, 2 B. & P., at p. 494, which are susceptible of the same answer. But a devise for A for life, remainder to "his children and so on for ever, and for want of such children," over, is an estate tail in A: *Trash* v. *Wood*, 4 My. & Cr., at p. 328.

(*p*) 16 East, 399. See also *Snowball* v. *Procter*, 2 Y. & C. C. C. 478 (to children and their children after them).

(*q*) It does not appear whether any were living at the date of the will; possibly there were, as one of the children of A was then married.

(*r*) See rule discussed Chap. XXXIII.

(*s*) In *Re Moyle's Estate*, 1 L. R. Ir. 155, it was not suggested that the rule could not be applied to renewable leaseholds, but the decision was against an estate tail.

(*t*) *Ante*, p. 1687.

construing *children* to be a word of limitation must be, that the first taker would have all, and the same reluctance is perceptible in the more recent cases of *Stone* v. *Maule* (*u*), elsewhere stated, and *Heron* v. *Stokes* (*x*).

"In such cases, however, the point seems to be immaterial; for as the rule only applies where there is no child to take jointly with the parent, and as the absolute interest in personalty passes without words of limitation, the result is, that the parent, as the only existing object at the time of distribution, would be solely entitled *quacunque via*" (*y*).

Bequests of personal annuities.

There is one class of cases, however, where the point would be material; that is, where there is a gift of an annuity to a person and his children. For though a simple gift of personalty or of the dividends or annual proceeds of a specified fund, passes the absolute interest to the legatee without words of limitation (*z*); yet where an annuity is so given, the annuitant takes only for life (*a*).

The weight of authority is against the application of the rule to personal estate (*b*).

What context will give life interest to parent with remainder to the children.

"Indeed," Mr. Jarman continues, "with respect to personal estate, an attempt has often been made on slight grounds, and sometimes with success, to cut down the parent (according to Sir J. Leach's construction in *Jeffery* v. *Honywood*) to a life interest, the children taking the ulterior interest by way of remainder. Thus, in *Crawford* v. *Trotter* (*c*) (a decision of the same Judge), a bequest of £1,000 reduced annuities to A and her heirs (say children), was held to give a life interest to A, and the capital to her children, "the word 'heirs,' which was used as synonymous with 'children,' importing that they were to take after her death.

"So, in the case of *Morse* v. *Morse* (*d*), where a testator gave to his daughter *A and her children* £5,000 for their sole use and benefit, £3,000 to be paid in one year after his decease, and £2,000 after the decease of his wife, and appointed A B *trustee*

(*u*) 2 Sim. 490.

(*x*) 2 Dr. & W. 89; Sug. Law of Prop. 236.

(*y*) See *Cape* v. *Cape;* 2 Y. & C. 543. And the result would be the same in reference even to real estate under wills made or republished since 1837, as the fee would pass by such wills without words of limitation.

(*z*) See *ante*, p. 1101.

(*a*) *Ib.* As a personal annuity cannot be entailed, the limitation to children, if it atttractd the rule in *Wild's Case*, would create a conditional fee: *Stafford* v. *Buckley*, 2 Ves. sen. 170.

(*b*) *Audsley* v. *Horn*, 1 D. F. & J. 226, affirming 26 Bea. 195; *Re Wilmot*, 76 L. T. 415; *Ward* v. *Grey*, 26 Bea. 485; *Scott* v. *Scott*, 11 Ir. Ch. R. 114; *Re Jones*, [1910] 1 Ch. 167; *Re Freeman's Trusts*, [1925] 1 Ir. R. 27; and Tudor's Leading Cases (4th ed.), pp. 365—367.

(*c*) 4 Madd. 361.

(*d*) 2 Sim. 485.

of those sums for his daughter and her children; Sir L. Shadwell, V.-C., held the £5,000 to be in trust for the daughter for life, and after her decease for all her children, whether born in the testator's lifetime or after his decease."

Again, in *Vaughan* v. *Marquis of Headfort* (*e*), a testator bequeathed a legacy to A and his children, *to be secured for their use*, and Sir L. Shadwell, V.-C., held that, as the latter words were inapplicable to A, since he might have taken his share and secured it for himself, they could only mean that the fund was to be secured for A for life, and for his children after his decease.

So, where the testator shows that the children when they take are to take the whole fund; as, where the bequest was in trust for A (then an infant) and such younger sons as she might have in equal shares, and if but one, then the whole to such one (*f*); or to A (then a spinster) and her children, but if *they* (which could only mean the children) should die without issue, the whole to go over (*g*): so, where the children are to take in unequal shares, which is incompatible with a joint tenancy with the parent (*h*); or where the testator appears to contemplate that their title will arise, or that the class will be ascertained, at the death of the parent, as, in the case of a bequest to A and B and their children, "without comprehending the husband of A and B unless they should die without issue" (*i*), or to A "for the benefit of herself and such children as she then had or thereafter might have by her then husband" (*k*); in all these cases the parents were held to take a life interest with remainder to their children. And where the testator gave a pecuniary legacy in trust for A for life with remainder to her children "exclusive of the two eldest"; and then gave the residue to A and her children, "including the two eldest," the gift of residue was construed by reference to the pecuniary bequest (*l*). The exclusion of the two eldest children from the latter being the only apparent reason for separating the two bequests.

It was even said by Sir J. Romilly (*m*) that "generally under

(*e*) 10 Sim. 639. See also *Combe* v. *Hughes*, L. R. 14 Eq. 415; *Ogle* v. *Corthorn*, 9 Jur. 325.

(*f*) *Garden* v. *Pulteney*, 2 Ed. 323; Amb. 499.

(*g*) *Audsley* v. *Horn*, 26 Bea. 195; 1 D. F. & J. 226.

(*h*) *Per* James, V.-C., *Armstrong* v. *Armstrong*, L. R. 7 Eq., at p. 522, approved by Lord Hatherley, in *Newill* v. *Newill*, L. R. 7 Ch., at p. 257.

(*i*) *Dawson* v. *Bourne*, 16 Bea. 29. See also *Lampley* v. *Blower*, 3 Atk. 396, *post*, Chap. LI; and cf. *Fisher* v. *Webster*, L. R. 14 Eq. 283.

(*k*) *Jeffery* v. *De Vitre*, 24 Bea. 296.

(*l*) *Re Owen's Trusts*, L. R. 12 Eq. 316. See also *Cator* v. *Cator*, 14 Bea. 463; and *Parsons* v. *Coke*, 4 Drew. 296, where a gift of accruing shares was governed by a gift of original shares.

(*m*) *Salmon* v. *Tidmarsh*, 5 Jur. (N.S.) 1380, where, however, *on the context* the wife and children were held to take concurrently. See also *Ward* v.

a gift to a wife and her children, if there was nothing to denote the proportions in which they were to take, the most natural disposition was to give the property to the wife for her life, and afterwards to her children," and he cited *Crockett* v. *Crockett* (*n*) as having laid down that rule. In that case, however, Lord Cottenham expressly distinguishes a simple gift to the mother and her children from one where there is an indication, however slight, of an intention that the children should not take jointly with the mother (*o*), and throughout his judgment it appears to be assumed that in the absence of all indication of such an intention concurrent interests will be created. And such is clearly the law. Thus, in *Pyne* v. *Franklin* (*p*), where a testator gave £200 to each of his nieces and their children, to be paid within nine months after the death of his wife, amongst his nieces *and their children*, as his wife should by will appoint. The wife died without having made any appointment. The executors, within nine months after her death, paid the legacies to the nieces, who afterwards died without having had any child. It was held that the payment was properly made.

Parent and children take concurrently where no contrary intention appears.

So, in *Newill* v. *Newill* (*q*), where a testator bequeathed all his property, real and personal, to his wife for the use and benefit of herself and all his children, whether by her or by his former wife, and appointed his wife and other persons his executors; it was held by Lord Hatherley that the wife and children took as joint-tenants; that this was the ordinary construction in the absence of a different intention being indicated in the will, and that although very small circumstances had been laid hold of, the mere circumstance that had been urged in argument, of the wife being made trustee, was not enough to warrant the Court in presuming that the fund was intended to be settled on herself for life, with remainder to the children.

Newill v. *Newill*.

Grey, 26 Bea. 485; Lord St. Leonards' remarks cited *ante*, p. 1865, n. (*g*); and the judgment of Joyce, J., in *Re Jones*, [1910] 1 Ch. 167. Instructions, or an executory trust, for a settlement on A and her children will be executed by making A tenant for life with remainder to the children, *Re Bellasis' Trust*, L. R. 12 Eq. 218; *Cator* v. *Cator*, 14 Bea. 463.

(*n*) 2 Phill. 553, stated *ante*, p. 869.

(*o*) See 2 Phill. pp. 555, 556.

(*p*) 5 Sim. 458.

(*q*) L. R. 7 Ch. 253, reversing Malins, V.-C., L. R. 12 Eq. 432, and discussing the principal authorities. *Re Astbury*, [1926] W. N. 336. See also *De Witte* v. *De Witte*, 11 Sim. 41; *Sutton* v. *Torre*, 6 Jur. 234; *Lenden* v. *Blackmore*, 10 Sim. 626; *Paine* v. *Wagner*, 12 *ib.* 184; *Read* v. *Willis*, 1 Coll. 86; *Cunningham* v. *Murray*, 1 De G. & S. 366; *Gordon* v. *Whieldon*, 11 Bea. 170; *Beales* v. *Crisford*, 13 Sim. 592; *Mason* v. *Clarke*, 17 Bea. 126; *Curtis* v. *Graham*, 12 W. R. 998; *Bibby* v. *Thompson*, 32 Bea. 646; *Fisher* v. *Webster*, L. R. 14 Eq. 283. See as to policies of assurance effected under the Married Women's Property Act, 1870, *Re Seyton*, 34 Ch. D. 511; *Re Davies*, [1892] 1 Ch. 90.

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But in *Re Byrne's Estate* (*r*), where there was a similar gift, followed by a power to the wife to fix the children's portions, it was held that the wife and children did not take as joint-tenants.

Trust for separate use of parent, when it excludes the rule.

A declaration annexed to a bequest to a woman and her children that she shall be entitled for her separate use, is not sufficient of itself to exclude the general rule (*s*), unless it can be collected that the declaration is intended to affect the whole fund (*t*).

Devises to *sons* not distinguishable from devises to *children*.

Mr. Jarman continues (*u*): "The same principle which regulates devises to children applies to devises to *sons*, the only difference being that the estate tail, which the latter term, where used as *nomen collectivum*, creates, will be an estate tail *male* (*x*). A devise to A for life, and after his decease to his sons, of course gives to A an estate for life, with remainder to his sons as joint tenants, which remainder will be either for life or in fee, according to the fact whether the will is regulated by the old law or the new law." But a devise to "the eldest son of B during his life, and then to his sons and their sons in succession" has been held to give the eldest son of B an estate in tail male (*y*).

The rule in *Wild's Case* has no application where the gift or devise to the children would, without reference to the rule, be a gift in succession to and not concurrently with their parent (*z*).

"Son," "child," "daughter," etc., where used as *nomina collectiva*.

II.—"Child," "Son," "Daughter," etc., where used as nomina collectiva.—Mr. Jarman continues (*a*): "We now proceed to consider a point which has often occupied the attention of the Courts, and still more frequently that of the conveyancing practitioner,—namely, whether the word 'son' or 'child' in the singular is a word of limitation; which, of course, is commonly its effect where used in a collective sense, *i.e.*, as synonymous with issue male or issue general.

(*r*) 29 L. R. Ir. 250. Compare *Re Newsom's Trusts*, 1 L. R. Ir. 373 (where under a gift to S. P. for the sole and separate use of herself and her family it was held that S. P. and her children took as joint-tenants). Cf. *Bradshaw* v. *Bradshaw*, [1908] 1 Ir. 288, where the mother had a power of appointment.

(*s*) *De Witte* v. *De Witte*, 11 Sim. 41; *Bustard* v. *Saunders*, 7 Bea. 92; 7 Jur. 986; *Fisher* v. *Webster*, L. R. 14 Eq. 283.

(*t*) *Froggart* v. *Wardell*, 3 De G. & S. 685 (a somewhat special case). See also *French* v. *French*, 11 Sim. 257; *Bain* v. *Lescher*, *ib.* 397; which however in this respect are similar to *De Witte* v. *De Witte* and *Bustard* v. *Saunders*, *supra*. A declaration that the issue should take vested interests at twenty-one will not prevent the parent and children taking concurrently, *Re Wilmot*, 76 L. T. 415.

(*u*) First ed., Vol. II, p. 317.

(*x*) 1 Bulst. 219; Bendl. 30.

(*y*) *Re Buckton*, [1907] 2 Ch. 406.

(*z*) *Re Jones*, [1910] 1 Ch. 167; discussed in *Re Freeman's Trust* (*Conyham* v. *Tripp*), [1925] 1 Ir. 27.

(*a*) First ed., Vol. II, p. 317.

"One of the earliest cases of this kind is *Bifield's Case* (*b*), where, after a devise to 'A, and, if he dies *not having a son*, then' over to the heirs of the testator, it was held that the word 'son' was used as *nomen collectivum*, and that the devise created an entail.

To A, and if he die *not having a son.*

"So, in *Milliner* v. *Robinson* (*c*), where a testator devised to his brother J., and if he should die *having no son*, that the land should remain over; it was held that J. had an estate tail.

To J., and if he die having no son.

"Again, in the case of *Robinson* v. *Robinson* (*d*), where the testator devised his real *estate* to L. for the term of his natural life, and no longer, provided he altered his name and took that of R., and lived at the testator's house at B., and after his decease, *to such son as he should have lawfully to be begotten* taking the name of R., and for default of *such* issue, then over to W. in fee; and the testator willed that L. might present whom he pleased to any vacancy in any of the testator's presentations during his (L.'s) life, and that bonds of resignation should be given in favour of L.'s children who were designed for holy orders; and, after the same should be disposed of as aforesaid, gave the *perpetuity* of the presentations to the said L. in the same manner and to the same uses as he had given his estates. On a bill to establish the will, Sir Joseph Jekyll, M.R., held that L. was entitled for life, remainder to his eldest, and but one, son for life, remainder in fee to W.; and Lord Talbot, on appeal, affirmed the decree. But afterwards, a bill having been filed by the second son of L. (the first having died an infant), the Judges of the Court of King's Bench, on a case sent to them by Lord Hardwicke, certified their opinion 'that L. must by necessary implication, to effectuate the manifest general intention of the testator, be construed to take an estate in tail male.' The Lords Commissioners, who succeeded Lord Hardwicke in the custody of the great seal, confirmed this certificate; and their decree was affirmed after great consideration and with the concurrence of all the Judges by the House of Lords.

To A for life, and after his death "to such son as he shall have."

"The authority of this case has long been beyond the reach of controversy, not only from its having been decided by the highest tribunal, but in consequence of its frequent recognition.

Remark on *Robinson* v. *Robinson.*

(*b*) Cited by Hale, C.J., in *King* v. *Melling*, 1 Vent. 231. See also *Murphy* v. *Johnston*, 6 Ir. Ch. 230; *Andrew* v. *Andrew*, 1 Ch. D. 410; with which compare *Bennett* v. *Bennett*, 2 Dr. & Sm. 266, stated below. "Die without having a son" is a phrase the construction of which seems now to be governed by 1 Vict. c. 26, s. 29, as to which see *post*, p. 1915.

(*c*) 1 Moore, 682, pl. 939, [said by Jessel, M.R. (*Beauchant* v. *Usticke*, [1880] W. N. 14), to be the same as *Bifield's Case*. See also *Re Bird and Barnard's Contract*, 59 L. T. 166 ("leaving no son")].

(*d*) 1 Burr. 38; 2 Ves. sen. 225; 1 Kenyon, 298; 3 B. P. C. Toml. 180 (*Robinson* v. *Hicks*).

Lord Kenyon founded a great number of decisions (*e*) upon it, and though his lordship did not invariably advert to the true principle (sometimes laying an undue stress on the words 'in default of *such* issue,' which a long line of cases has established to be merely referential (*f*)), yet in *Doe* v. *Mulgrave* (*g*), he distinctly treated the case as standing on the ground to which it has been here referred.

To A, and if she marries and has a son, then to that son.

"Again, in the case of *Mellish* v. *Mellish* (*h*), where the devise was in these words: 'Hamels to go to my daughter C. M. as follows: *in case she marries and has a son, to go to that son*; in case she has more than one daughter at her death, or her husband's death, *and no son*, to go to the eldest daughter; but in case she has but one daughter, or no child at that time, I desire it may go to my brother W. M.' In a subsequent part of his will the testator added, 'Mrs. P. to receive £200 a-year from C. M., during the life of Mrs. P.' The question was what estate C. M. took in Hamels. It was contended for her, on the authority of *Wight* v. *Leigh* (*i*), *Wharton* v. *Gresham* (*k*), *Chorlton* v. *Craven* (*l*), *Sonday's Case* (*m*), and *Wyld* v. *Lewis* (*n*), that she took an estate tail. On the other side it was insisted that C. M. took the fee by the effect of the annuity made payable by her (*o*), and which fee was defeasible on either of three events: first, if she married, and had a son, it was to go to that son; secondly, if she had more than one daughter and no son, it was then to go to the eldest daughter; and, thirdly, if she had no child at all (or, it seems, if she had only one daughter), it was to go to W. M. The Court, however, held that C. M. took an estate tail male. *Bayley*, J., said, 'It may be collected from the authorities that if the word *son* be used, not as *designatio personæ*, but with a view to the whole class, or as comprising the whole of the male descendants, severally and successively, then it is the manifest intention of the testator to

"Son," held to be a word of limitation.

(*e*) See *Hay* v. *Coventry*, 3 T. R., at p. 86; *Doe* v. *Applin*, 4 *ib.*, at p. 87; *Denn* d. *Webb* v. *Puckey*, 5 *ib.*, at p. 303; *Doe* d. *Candler* v. *Smith*, 7 *ib.*, at p. 533; *Doe* d. *Bean* v. *Halley*, 8 *ib.*, at p. 8; *Doe* d. *Cock* v. *Cooper*, 1 East, at p. 234.

(*f*) See *post*, Chap. LII. "In this observation, which the writer has found it necessary often to make, he leaves out of view the well-known operation of the words 'in default of such issue,' to create cross remainders among several tenants in tail, which turns on a different principle." (Note by Mr. Jarman.)

(*g*) 5 T. R. 321.

(*h*) 2 B. & Cr. 520. Examine the case of *Seaward* v. *Willock*, 5 East, 198, in reference to this doctrine.

(*i*) 15 Ves. 564, *post*.

(*k*) 2 W. Bl. 1083; *ante*, p. 1865, n. (*e*).

(*l*) Cit. 2 B. & Cr. 524, *post*, p. 1883.

(*m*) 9 Rep. 127.

(*n*) 1 Atk. 432, *post*, p. 1881.

(*o*) "And other grounds which were clearly inadequate." (Note by Mr. Jarman.)

give an estate tail; and it is equally clear that words are not to operate as an executory devise which are capable of operating in any other way. In this case the words are, "Hamels to go to my daughter C. M. as follows, *viz.* in case she marry, and has a son, then it is to go to that son." Now, if the word "son" be used as *nomen collectivum*, it would give to C. M. an estate to continue as long as there should be any male descendants of her, and that would be an estate in tail male. I cannot find in the subsequent part of this will anything inconsistent with the construction that ought to be put upon it, if it had stopped here.' *Holroyd*, J., said, the word 'son' should be read *any son*. The Court afterwards certified, 'that C. M. took an estate in tail male, with a reversion in fee (*p*), subject to other estates created by this will.'

Remark on *Mellish* v. *Mellish*.

"It is evident, from the concluding words of the certificate, that the Court considered the eldest daughter would take an estate in the event described. The intention expressed in favour of the *eldest* daughter, of course, would not operate to confer on the parent an estate tail which would descend to daughters.

"Son" held to be a word of limitation.

"Again, in the case of *Doe* d. *Garrod* v. *Garrod* (*q*), where a testator, by his will devised thus: 'As to my worldly estate, I dispose thereof as follows: I give to my nephew T. G. all my lands, to have and to hold during his life, *and to his son, if he has one, if not*, to the eldest son of my nephew J. G., and to his son after him, if he has one, if not, to the regular male heir of the G. family.' By codicil, stating that his nephew T. G. then had a son born, the testator gave all his lands to that son after his father's decease; and to his '*eldest son, if he has one*; but if he has no son, then to the next eldest regular male heir of the G. family.' It was held that by the will and codicil the son of T. G. took an estate tail. Lord Tenterden, C.J., considered that the testator did not intend the estate to go over to the G. family while any issue male of his great nephew should remain, and that the giving an estate tail to the devisee was warranted by *Sonday's Case*.

"So, in the case of *Doe* d. *Jones* v. *Davies* (*r*), where a testator, after premising that, should his daughter die unmarried, he would not have his estate sold or frittered away after her decease, but that it should be entailed, devised all his real estate to trustees, to permit his daughter, . . . not only to receive the rents and profits thereof for her own use, or to sell or mortgage any part, if occasion required; but also to settle on any husband

(*p*) She was heir-at-law.
(*q*) 2 B. & Ad. 87.
(*r*) 4 B. & Ad. 43.

Word "child" held to be used as *nomen collectivum*, and to confer an estate tail.

she might take the same or any part thereof for life, should he survive her, but not without his being liable to impeachment for waste or non-residence, or neglecting repairs. He then added, that should '*my daughter have a child I devise it to the use of* SUCH CHILD, from and after my daughter's decease, with a reasonable maintenance for the education, etc., of such child in the meantime. Should *none of these cases happen*,' the testator devised the estate to a nephew, subject to a condition to reside, etc., and to his first and every other son, and in default he gave the estate to another person on a like condition, and his first and every other son. The will then proceeded as follows :—'My will and meaning for having the house and farm occupied is for the sake of improving the neighbourhood as far as my poor abilities extend, which would be otherwise proportionably impoverished, for protecting the parish and supporting its poor. This I am persuaded is my daughter's wish as well as my own, whom I by no means will to restrain as a tenant for life; but in case that either of the remaindermen should ill-treat her, or should be likely to turn out an immoral man, or a bad member of society, she may, by the advice or consent of the trustees, set aside such an one by her own will and testament, that my intention of doing good in the neighbourhood might not be defeated. I recommend it to my daughter, for *want of issue to herself*, not to leave in legacies above five or six hundred pounds, and that out of my charge on Nevern,' (a distinct property of the testator,) 'which I have also articled for, and entail the rest for the further support of this house.' At the time of the making of the will, and at the death of the testator, the daughter had no child. It was held, that the word 'child,' as here used, was *nomen collectivum*; it being evident from the whole tenor of the will that the testator intended that the estate should not go over to the devisees in remainder until the failure of issue of his daughter. The Court considered that the case came within the principle of those in which the word *son* had been held to be *nomen collectivum*, particularly *Bifield's Case*.

Raggett v. *Beaty*.

"To this class of cases it is conceived also belongs the case of *Raggett v. Beaty* (*s*), where a testator devised a messuage to the use of G. (the second son of his nephew J.) to enter upon and possess the same after the decease of his father, and he directed the said J. and G. to pay the sum of £100 within one year after his decease to A and B upon certain trusts; but in case they did not pay the said sum, he ordered A and B to let the premises and receive the rents until the £100 should be paid, they keeping possession of the deeds and not allowing the said J.

(*s*) 2 M. & Pay. 512; 5 Bing. 243; *Parker* v. *Birks*, 1 K. & J. 156.

"In case A should leave no child," with context:—Held, to create an estate tail.

and G. either to sell or mortgage any part of the premises until the legacies were all paid and G. was twenty-one years of age; *or, if in case the said G. should die and leave no child lawfully begotten of his own body*, it was his will that the said A and B, their heirs and assigns, should sell the premises and distribute the money arising therefrom amongst his (the testator's) brothers and sisters and C and D, or their heirs, in such shares as the trustees should think proper. The question sent for the opinion of the Court of Common Pleas was, what estate G. had upon the death of his father. It was contended that G. took an estate tail as the result of the apparent intention that the estate should not go over unless there was an ultimate indefinite failure of issue of G.; and the cases relied upon for this construction were those in which words importing a failure of issue had been so construed. On the other side it was argued that the intention to be collected from the whole will was, that G. should take an estate in fee, with an executory devise over in case of his not leaving issue at his death; and the argument for holding the devisee to take a fee was founded mainly on the testator's direction to the devisees to pay the £100; and no attempt seems to have been made to distinguish the word 'child,' as used in this devise, from the word 'issue,' which occurred in the cited cases. The Court, however, certified that G. took an estate tail.

Remark on *Raggett* v. *Beaty*.

"This is the most signal instance in which an estate tail has been created by a devise over in case of the prior devisee leaving no child, though the tenor of the authorities discussed in the present chapter and some others, especially *Doe* v. *Webber* (*t*), (in which Lord Ellenborough made very little difficulty of construing the word 'children' in such a position as synonymous with *issue*,) had certainly paved the way to such a result. An example of this species of construction has since occurred (though with an assisting context) in the case of *Doe* d. *Simpson* v. *Simpson* (*u*), where a testator gave certain lands to his son A, his heirs and assigns for ever; but if it should happen that A should die *without leaving any child or children*, he devised the estate to B, C, D, E and F, their heirs and assigns for ever as tenants in common, with a limitation over to the survivors in case of any of them dying under age and without issue. And the testator in a certain event devised other property, subject to the same mode of distribution among the five devisees over as the before-mentioned property given to A 'in case he died

Words referring to leaving no *children* held to mean, leaving no *issue*.

(*t*) 1 B. & Ald. 713. See also *Hughes* v. *Sayer*, 1 P. W. 534, *ante*, p. 1694; *Wyld* v. *Lewis*, 1 Atk. 432; *Voller* v. *Carter*, 4 Ell. & Bl. 173; *Coles* v. *Witt*, 2 Jur. (N.S.) 1226.

(*u*) 5 Scott, 770; 4 Bing. N. C. 333; 3 M. & Gr. 929 (*Doe* d. *Blesard* v. *Simpson*).

without issue.' It was considered by the Court that the testator had, by the latter clause, expressly declared the meaning of the prior devise to be, if the first taker should die *without issue*" (*x*). They thought, however, that even without this clause there would have been strong grounds for coming to the same conclusion. And in *Bacon* v. *Cosby* (*y*), where a testator left "his entire fortune equally divided between his two daughters, and directed that the portion of his youngest daughter should devolve, in case of her dying without children, to his eldest daughter and her children"; a similar construction prevailed, though there was no explanatory context, and the consequence was that the gift over was void as to the personal estate. The younger daughter never had a child (*z*), but the elder had two children living at the date of the will, and, in giving judgment, Sir J. K. Bruce, V.-C., said that, according to the whole course of the decisions and the plainest rules of construction, the younger daughter would have been held to take an estate tail in the realty, and an absolute interest in the personalty, but for the words "and her children" occurring at the end of the will and applied to the elder daughter, coupled with the fact that the elder daughter had children at the date of the will. This, however, he thought was much too slight and conjectural a ground for departing from a settled rule of construction.

In an Irish case (*a*), real estate was devised to T. for life and in case of no issue by him to J. with remainder to her children for ever. T. died unmarried. It was held that "children" was a word of limitation and that J. took an estate tail.

(*x*) "A strong instance of refusal to construe the word 'issue' as synonymous with *children* occurs in the case of *Malcolm* v. *Taylor*, 2 R. & My. 416, as the testator had, in reference to another subject-matter, clearly used the word issue in that sense.

Question whether words referring to failure of *issue* meant *children*, as in another gift in same will.

"A bequeathed the residue of her funded property and her plate to B and C for their lives, and after the decease of the survivor to such of the children of C as she should by deed or will appoint,* and in default of appointment, the residue of the money in the funds to be equally divided among the said children; *and, in case C should die without issue as aforesaid*, the testatrix bequeathed her funded property and plate to certain persons. It was held that the words 'without issue as aforesaid,' in reference to the funded property, meant without such issue as were objects of the prior gift, *i.e.*, children, but that as to the plate, of which there was no gift to the children of C, the words were to be construed as importing a general failure of issue, and consequently that C was absolutely entitled." (Note by Mr. Jarman.)

* "This power, it is observable, was not considered to raise an implied trust for the children as to the plate."

(*y*) 4 De G. & S. 261. See *Egan* v. *Morris*, 2 Ll. & Goo. t. Plunk. 297, where there was a devise to A for life, with a gift over if he should die unmarried or without children.

(*z*) So that if the devise had been to her and her children, she would have taken an estate tail on the authority of *Wild's Case*, see 3 M. & Gr., at p. 954. But this reasoning is not applicable in the case of personal estate alone. *Stone* v. *Maule*, 2 Sim. 490; *Audsley* v. *Horn*, 1 D. F. & J. 226, *ante*, p. 1874.

(*a*) *Ward* v. *Ward*, [1921] 1 Ir. R. 117.

Mr. Jarman continues (*b*): "An instance of the word 'child' being construed as qualifying the word 'heirs' in the preceding devise, is afforded by the case of *Doe* d. *Jearrad* v. *Bannister* (*c*), where a testator devised a certain property to A and her heirs, *if she has any child;* if not, after the decease of herself and her husband, then to B and her heirs. It was contended that it was a devise in fee, upon the condition of A having a child; but the Court of Exchequer held that she was tenant in tail (*d*).

"If she has any child."

"But it is not to be inferred from the preceding cases that a devise, definitely pointing out the eldest, or any other individual son, will (unaided by the context) have the effect of conferring an *estate tail* on the parent." If any doubt was thrown on this position by *Chorlton* v. *Craven* (*e*), it is removed by *Parker* v. *Tootal* (*f*). Both cases arose on the same will, in which the devise was to Thomas C. during his natural life, with remainder to the first son of the body of the said Thomas lawfully begotten severally and successively in tail male of the name of C., and for want of such lawful issue of that name either by his (testator's) son Thomas C. or his son James C., then the testator devised the estate to his daughters and their children, share and share alike. The Court of King's Bench, on a case from Chancery, certified Thomas to be tenant *in tail male*, which was confirmed by Lord Eldon; and in 1823 the Court of Exchequer came to the same decision upon the same devise.

Whether term "eldest son" used as *nomen collectivum.*

In the absence of all information as to the precise grounds of the decision it might seem that the devise to the son had some influence on the conclusion that Thomas C. had an estate tail male. The words "severally and successively," however, give rise to a strong suspicion that a devise to the second and other sons successively in tail was inadvertently omitted: and the true construction of the will being again mooted in 1865, it was held in the House of Lords (*g*), that such a devise was necessarily implied by those words; and that the words "first and other

Remark on *Chorlton* v. *Craven.*

(*b*) First ed., Vol. II, p. 325.

(*c*) 7 M. & Wels. 292. See *Goodtitle* d. *Cross* v. *Wodhull*, Willes, 592.

(*d*) The actual decision was that the devise over took effect, as A died without leaving a child; two of the Judges thought that A took an estate tail, but Gurney, B., simply said that the intention of the testator was to give the estate over to B if A died without children.

(*e*) 3 D. & Ryl. 808, cited 2 B. & Cr. 524.

(*f*) 11 H. L. C. 143. *Re Cleary's Trusts*, 16 Ir. Ch. 438.

(*g*) *Parker* v. *Tootal*, 11 H. L. C. 143. The actual decision turned on a totally different point; but the opinions of Lords Westbury, Cranworth and Chelmsford (as stated above) were deliberately given for the express purpose of discouraging future litigation. Thomas never had a son, and no decided opinion was given whether he was tenant in tail in remainder after the estates expressly limited to his sons with vested remainders over (to which, however, the House inclined), or tenant for life only with contingent remainders over. Either way he had acquired the fee simple by recovery, and this was all that was decided in the Court of Exch., *Rushton* v. *Craven*, 12 Pri. 599.

sons" were not words of limitation enlarging the estate of Thomas, but that they gave all the sons of Thomas successively estates in tail male by purchase in remainder after Thomas's life estate. The decision in the Court of King's Bench, according to which Thomas was tenant in tail male, and in which (understanding thereby tenant in tail male in remainder after the estates tail of his sons) the House was inclined to agree, was considered to depend on the subsequent words "in default of *such* issue of that name either by Thomas or James," the word "such" being referred to "male" in the previous gift (*h*).

Devise to "eldest son" held not to confer an estate tail male.

A question of this kind was much discussed in *Doe* d. *Burrin* v. *Charlton* (*i*), where a testator devised a messuage to his kinsman S. C. for his life, and after his decease to the *eldest son* of S. C., but for want of such issue, then to his (S. C.'s) daughters or daughter, share and share alike, for ever; but in case his said kinsman had no issue, then to hold to S. C., his heirs and assigns for ever. It was contended, on the authority of the last case, that the word "son" was to be construed as *nomen collectivum*; and consequently that S. C. took an estate tail male, precedent to the general estate tail which was assumed to arise by implication from the words referring to a failure of issue in the devise over (*k*). But the Court decisively negatived this construction, and held that S. C. took only an estate in tail general.

In *Bennett* v. *Bennett* (*l*), where a testator devised all his property to his sister in fee simple, except one tenement, which she was to have for her life only, "and afterwards to my sister's eldest son on his taking the name of M.; but should he refuse to take that name, or my sister die without a son," then to P. on his taking the name of M., and so on to his heirs, each of them taking the name of M.; it was contended that the words "eldest son," taken with the gift over "if my sister die without a son," gave the sister an estate tail: but it was held by Kindersley, V.-C., that primarily "eldest son" meant an individual; and that although it might bear the sense of issue male if the context required it, there was here no such context; on the contrary, if "eldest son" were so construed, the gift over if "he" refused to take the name must also be read "if all issue male," however remote, refused—which could not be the intention. As to the gift over "without a son," the V.-C. said

(*h*) As to this last point, see *S. C.*, mentioned again, *post*, p. 1925.
(*i*) 1 Scott, N. R. 290. And see *Foord* v. *Foord*, 3 B. P. C. Toml. 124.
(*k*) *Ante*, p. 633.
(*l*) 2 Dr. & Sm. 266. It was held that the sister's first-born son took at his birth a vested fee simple subject to a condition subsequent which was void for remoteness.

it was exactly correlative to "eldest son": it was the same thing whether the testator said "if she die without a son" or "if she die without an eldest son"; since if she die without a son she must die without an eldest son (*m*).

And in *Re Bishop and Richardson's Contract* (*n*), where the devise was to J. for life and at his decease to his eldest son or heir-at-law, it was held that J. took only a life estate with remainder to his eldest son or heir-at-law as *personæ designata*.

But a testator who does not make a series of limitations sufficient in themselves to create an estate tail, may by general words show his intention to create such an estate. As in *Jenkins* v. *Hughes* (*o*), where the testator made A and his eldest son successively heirs to his estates, and directed that if A should not leave a son the next brother of A should succeed, "and so on," his desire being that his estates should always descend in the main line: it was held that A took an estate tail.

Devise to "eldest son" held to give an estate tail, on the context.

It is not always easy to distinguish cases of this kind from those to which the doctrine of *cy-près* is applicable. Thus, in *Forsbrook* v. *Forsbrook* (*p*), where a testator declared that his real and personal property should be inherited by his nephews, T. F. and C. F., during their lives, and after their death by their eldest sons for their lives, and so on, the eldest son of the two families of the name of F. to inherit the aforesaid property for ever, and that each two of the succeeding inheritors should inherit the property free from incumbrances; it was held by Lord Cairns and Sir J. Rolt, L.JJ., that the words "and so on, etc., for ever" indicated a series of inheritances, and were words of limitation giving estates tail, not to the eldest sons of T. F. and C. F. (for they were expressly made tenants for life), but to T. F. and C. F. by way of remainder after those life estates. That estates of inheritance were intended (it was added) was further shown by the direction respecting incumbrances, which would have been unnecessary if the estates were only for life (*q*).

"To A for life, and to his eldest son after his death," held an estate tail in A by force of subsequent devise in tail "in like manner."

In *Lewis* v. *Puxley* (*r*), a testator devised his real estate in the county of P. to his eldest son John, for life, and to his eldest legitimate son after his death; and in default of such issue, he gave it in like manner to his son Richard; and in case

(*m*) Compare *Andrew* v. *Andrew*, 1 Ch. D. 410, where a gift over "in default of a son" (following a gift to the eldest son) was held to mean a general failure of issue. But *Bennett* v. *Bennett* is distinguished by the additional event of refusal to take the name of M.

(*n*) [1899] 1 Ir. R. 71.

(*o*) 8 H. L. C. 571.

(*p*) L. R. 3 Ch. 93.

(*q*) See *ante*, p. 259, n. (*g*).

(*r*) 16 M. & Wel. 733.

Richard had no legitimate issue male, then in like manner to the offspring about to be born of his (testator's) wife, and in default of such issue, to his own right heirs. And he declared that he made no provision for his son Richard if John lived, because he knew he was otherwise well provided for. It was contended, on the authority of *Doe* v. *Charlton*, that the devise to John and his eldest son after him, gave John no more than an estate for life, and, on the authority of *Goodtitle* v. *Wodhull* (*s*), that this could not be affected by the subsequent expressions in the devise to Richard: but the Court of Exchequer, while allowing the first branch of the argument, rejected the second, and held that the expression "eldest legitimate son" was explained by the subsequent part of the will to be *nomen collectivum*, and gave John an estate tail.

But the case may be reversed, and the words "eldest son," or the like, which might otherwise have conferred an estate tail on the parent, may, by a similar argument, be confined to their literal meaning. By such referential expressions the testator is supposed to show the sense in which he understands the preceding devise (*t*).

In *Re Buckton* (*u*), the devise was to trustees upon trust to the use of A to permit him during his life to occupy the same or receive the rents arising therefrom, and after his decease to permit the eldest son of A to occupy or receive the rents during his life, and then "to his sons and their sons in succession." It was held that the eldest son of A took an estate in tail male.

Rule abolished.

III. Abolition of the Rule.—Since, as we have seen, in the case of wills coming into operation after 1925, estates tail can only be created by formal words (*y*), the rule in *Wild's Case* is abolished, so that under a devise to A and his children, the devisees will take as joint tenants (*z*).

(*s*) Willes, 592.
(*t*) *East* v. *Twyford*, 9 Hare, 713; 4 H. L. C. 517, overruling the decision of the Court of Exchequer on the same will, 9 Hare, 730, n.
(*u*) [1907] 2 Ch. 406.
(*y*) *Ante*, p. 1812; see section 130 of the Law of Property Act, 1925.
(*z*) See *Re Hammond*, [1924] 2 Ch. 276.

CHAPTER LI (*a*).

"ISSUE" AS A WORD OF LIMITATION BEFORE 1926.

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In this chapter Mr. Jarman discusses the construction of the word "issue" in devises of real estate. Bequests of personalty are subject to different rules. These will be found discussed in other parts of this work, especially with reference to the question whether a gift to a man for life, with remainder to his issue, gives him an estate for life or an absolute interest (*b*), and with reference to the question whether a gift to a class of persons "or their issue," or "and their issue" is a substantive or substitutional gift to the issue (*c*). The question what persons take under a gift to "issue" as purchasers is also discussed elsewhere (*d*).

"Issue" a word of limitation, when.

I.—Devise to a Person and his Issue.—"Issue" says Mr. Jarman (*e*), "is *nomen collectivum*, and a word of very extensive import. The term embraces descendants of every degree whensoever existent, and, unless restricted by the

(*a*) In the case of wills coming into operation after 1925 "issue" will no longer be a word of limitation in devises of real estate, but the words will be construed as if it was a bequest of personalty (section 130, sub-section 2 of the Law of Property Act, 1925). Consequently the topics dealt with in this chapter only apply to wills which came into force before January 1, 1926.

(*b*) Chap. XXXIII.

(*c*) Chap. XXXVI.

(*d*) Chap. XLI.

[(*e*) First ed., Vol. II, p. 328.

context, cannot be satisfied by being applied to descendants at a given period. The only mode by which a devise to the issue can be made to run through the whole line of objects comprehended in the term, is by construing it as a word of limitation synonymous with *heirs of the body*, by which means the ancestor takes an estate tail; an estate capable of comprising in its devolution, though not simultaneously, all the objects embraced by the word 'issue' in its largest sense.

"Opinions certainly have differed as to the signification of the word *issue*. It has been denominated by some judges (*f*) and writers a word of limitation; and a devise to A and his issue has even been stated by an eminent judge as 'the aptest way of describing an estate tail according to the statute' (*g*); by others, 'issue' has been called a word of purchase, or an ambiguous word (*h*). However, it is not from such dicta that the true legal acceptation of the word is to be collected, but from the adjudications *fixing its operation*. Unhappily, some discordancy prevails even here, and an examination of the cases will serve to evince that, in the enunciation of any general proposition on the subject, the utmost caution is requisite."

According to the latest decisions, however, "issue" (in a will coming into operation before 1926) is *prima facie* a word of limitation, equivalent to "heirs of the body," but more flexible than these and more easily restricted in its meaning by the context (*i*).

Before 1926 devise to A and his issue simply gives estate tail.

Mr. Jarman continues (*k*), "With regard to a devise simply to *a person and his issue*, no doubt can at this day be raised as to its conferring an estate tail; and it may be observed, that such a devise is not (like a devise to a person and his children (*l*)) dependent on, or, it seems, in the least degree, influenced by the fact of there being or not being issue of the devisee living at the date of the will, or at any other period (*m*).

(*f*) See *per* Parke, B., in *Slater* v. *Dangerfield*, 15 M. & Wels., at p. 272; *Roddy* v. *Fitzgerald*, 6 H. L. C. 823; *Pelham Clinton* v. *Newcastle*, [1902] 1 Ch. 34; [1903] A. C. 111.]

(*g*) *Per* Lord Thurlow, in *Hockley* v. *Mawbey*, 1 Ves. jun., at p. 149.

(*h*) See judgments in *Ginger* d. *White* v. *White*, Willes, 348; *Roe* d. *Dodson* v. *Grew*, 2 Wils. 324; *Doe* d. *Cooper* v. *Collis*, 4 T. R. 294; *Earl of Orford* v. *Churchill*, 3 V. & B. 59; *Lyon* v. *Mitchell*, 1 Mad. 467; *Tate* v. *Clarke*, 1 Bea. 100; *Doe* d. *Gallini* v. *Gallini*, 3 Ad. & Ell. 340.

[(*i*) *Per* Wood, V.-C., Kay, at p. 24; 1 K. & J., at p. 362. See also *Bradley* v. *Cartwright*, L. R. 2 C. P. 511. In gifts of personalty, the tendency seems to be to treat "issue" as a word of purchase rather than a word of limitation, but the question is one of construction in each case: *Re Coulden*, [1908] 1 Ch. 320.]

(*k*) First ed., Vol. II., p. 329.

(*l*) *Ante*, p. 1864.

(*m*) Lord C.J. Hale, in *King* v. *Melling*, 1 Vent., at p. 231, says, "though the word *children* may be *made nomen collectivum*, the word issue is *nomen collectivum* of *itself*." [See *S. C.*, 2 Lev. 58; 3 Keb. 95. This dictum seems to refer only to issue when taking expressly by way of

Upon the same principle as that on which, in the cases just referred to, the devisee is held to be tenant in tail where the property can reach the children in no other way, he is here construed to take an estate tail *at all events*, namely, because there is no other mode by which the testator's bounty can be made to flow to and embrace the whole range of intended objects" (*n*).

Special tail.

The class of issue may be restricted so as to create an estate in special tail; for instance, a devise "to my wife and the issue of our marriage" (*o*), "to my son C. and such issue male as he may have by marriage with a fit and worthy gentlewoman" (*p*), or a devise to A, "but the said A shall never have power to sell or mortgage any of these lands, nor no person to inherit any of them, unless a lawful issue of a male child got by marriage with a respectable Protestant female of proper conducted parents" (*q*).

So, to a class and their issue.

So a devise to several persons and their issue (*r*), or to a class and their issue (*s*), confers an estate tail.

To A and his issue *living at his death*, held an estate tail.

Mr. Jarman continues (*t*), "It has even been held that a devise to A and his issue *living at his death* creates an estate

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remainder: for, after stating the effect of a devise to B, and the issue of his body (B having no issue at the time) to be an estate tail, the C.J. adds, "I agree it would be otherwise if there were issue at that time." However (as Lord Hardwicke said, 3 Atk., at p. 397), *Wild's Case* was decided before it was fully settled that "issue" was as proper a word of limitation as "heirs of the body": and in *Martin* v. *Swannell*, 2 Bea. 249, the question whether there was issue or not at the time of the devise appears to have been thought immaterial, since it was not adverted to.]

(*n*) It seems extremely probable that a devise to A and his *next* or *eldest* issue male, would now be held to give an estate tail male, though the contrary was decided in the early case of *Lovelace* v. *Lovelace*, Cro. El. 40, which cannot be reconciled with later cases, especially *Doe* v. *Garrod*, 2 B. & Ad. 87, *ante*, p. 1879. That the word *next* or *eldest* prefixed to the words heir male in a devise to a person and his heir male, does not prevent the latter words from conferring an estate tail, has long been settled (*ante*, p. 1803); but since the recent case of *Lees* v. *Mosley*, 1 Y. & C. 589, *post*, establishing the greater inflexibility of limitations to heirs of the body than limitations to issue, this must not be considered conclusive.

[In *Sheridan* v. *O'Reilly*, [1900] 1 Ir. R. 386, the words "eldest male issue" were held to be words of purchase. In that case Porter, M.R., said that he was not able to see that *Doe* v. *Garrod* might not very well stand together with *Lovelace* v. *Lovelace*. But in *Re Cosby's Estate*, [1922] 1 Ir. R. 120, the words "eldest male issue" were held to be *nomen collectivum* and words of limitation. The land in *Lovelace* v. *Lovelace* (Cro. Eliz. 40) was gavelkind and that case was held not to be an authority in the case of freeholds. See an article in the Law Times Newspaper, January, 1923, p. 64. So in *Re Fitzroy's Estate*, [1911] 1 Ir. R. 145, "eldest lawful male issue" was construed as *nomen collectivum*.

(*o*) *Walsh* v. *Johnston*, [1899] 1 Ir. R. 501.

(*p*) *Pelham Clinton* v. *Newcastle*, [1902] 1 Ch. 34; [1903] A. C. 111; see below, p. 1897.

(*q*) *Magee* v. *Martin*, [1902] 1 Ir. R. 367.

(*r*) *Parkin* v. *Knight*, 15 Sim. 83 (the gift was to several *or* their issue, and "or" was read "and"); *Underhill* v. *Roden*, 2 Ch. D. 494.

(*s*) *Beaver* v. *Nowell*, 25 Bea. 551; *Campbell* v. *Bouskell*, 27 Bea. 325.]

(*t*) First ed., Vol. II, p. 930.

tail in A (*u*). In such a case, it is clear, the issue cannot take as joint-tenants with him, since the objects are not ascertainable until the death of the parent. It is only through him that they can become entitled, and the case falls, therefore, within the principle of the rule in *Wild's Case*, namely, that the parent must take an estate tail, in order to let in the other objects. Had the devise been to A for life, *with remainder* to the issue living at his death, the case would have been different (*x*). All the objects might then have taken by purchase (*y*).

Effects of words of modification inconsistent with an estate tail.

II.—Effect of Words creating a Tenancy in Common, and other modifying Expressions.—" So far, the cases present little that can be the subject of controversy; but difficulty frequently arises from the introduction into the devise of expressions inconsistent with the course of devolution or enjoyment under an estate tail, as, that the issue shall take in equal shares or *as tenants in common*, or that the estate shall go *over in case they die under twenty-one*, which has been regarded as inapplicable to issue indefinitely. If the Courts had uniformly rejected these inconsistent provisions as repugnant, immense litigation and discordancy of decision would have been prevented. This has been shown to be now the established rule in regard to limitations to *heirs of the body* (*z*); and there might seem, upon principle, to be strong ground to contend for the application of the same doctrine to the cases under consideration. The word *issue* is not less extensive in its import than heirs of the body: it embraces the whole line of lineal descendants; it is used in the statute *De Donis* (*a*), in some instances at least,

(*u*) *University of Oxford* v. *Clifton*, 1 Ed. 473. [And see *Jenkins* v. *Hughes*, 8 H. L. C. pp. 571, 585.]

(*x*) See *Lethieullier* v. *Tracy*, 3 Atk. pp. 774, 784, 796; Amb. pp. 204, 220; 1 Ken., at p. 56.

(*y*) Considering the inclination manifested in some of the recent cases to construe a devise to a person and his children, as amounting to a devise to A for life, with remainder to his children (*ante*, pp. 1869, 1873), perhaps the reader will not be disposed to place implicit confidence in the adjudication that a devise to A and his issue, living at his decease, gives to A an estate tail. There would seem to be less difficulty, in such a case, in reading the gift to the issue as a remainder that in that of a devise to A and his children. [Such a remainder, though contingent, would not now be destructible during the life of A.] At all events, there can scarcely be a doubt that the words in question applied to *personal* estate, would be construed in the manner suggested, namely, as giving a life interest to A, with a contingent disposition of the ulterior interest to the issue living at his death; [and this seems to have been Lord Hardwicke's construction in *Lampley* v. *Blower*, 3 Atk. 396, where he held that the gift over on death without *leaving* issue explained the word issue in the gift " to Francis and Ann each one-half, and to their issue," to mean such issue as was left at the time of the death. He denied that the issue took jointly with the parent, while at the same time he decided that there was no lapse, which there would have been if " issue " had been taken as a word of limitation.]

Lampley v. *Blower*.

(*z*) *Ante*, p. 1848.

(*a*) 13 Edw. 1, c 1.

synonymously with heirs of the body, and the cases are very numerous in which it has been held to create an estate tail. It will be seen, however, that, in some instances, the word *issue* has been diverted from its general legal acceptation by the occurrence of words of distribution, or other expressions which point at a mode of devolution or enjoyment inconsistent with an estate tail, and have been decided to be insufficient to convert the term *heirs of the body* into children, or to prevent its conferring an estate tail.

"Some confusion arises in the cases from the neglect to distinguish between a devise to A and his issue in one unbroken limitation, and a devise to A *for life*, and *after his death* to his issue. It is true they both converge to the same point, when *issue* is construed a word of limitation; but if, on the other hand, the issue are held to be purchasers, they must, it is conceived, take differently in the two cases; in the former *jointly with the parent*, in the latter *by way of remainder* after him; though certainly, in some of the cases, this distinction has been overlooked, and the Courts have shown a readiness, even where the devise is to a person and his issue, not only to read 'issue' as a word of purchase, on account of words of modification inconsistent with an estate tail being found in the devise, but to hold the issue to take by way of remainder expectant on the estate for life of the ancestor.

To A and his issue, as *tenants in common*, but in default of such issue, *or in case they should die under twenty-one*, over.

"Thus, in the case of *Doe* d. *Davy* v. *Burnsall* (*b*), where a testator devised freehold and leasehold *estates to M. and the issue of her body* lawfully to be begotten, *as tenants in common* (if more than one), but in default of such issue, or, living such, if they *should all die under the age of twenty-one years*, and without leaving lawful issue of any of their bodies, then over to A. M., before the birth of a child, suffered a recovery. It was held by the Court of King's Bench, that M. took for life, with remainder in fee to her children, if she had any; but if she had none, or they died under twenty-one, and without leaving lawful issue, then over; and that this remainder, therefore, being contingent, was barred by the recovery of M. The same devise afterwards came before the Court of Common Pleas (*c*), on a case from Chancery; and that Court certified that M. took only an estate for life (*d*), with contingent remainders over. Eyre, C.J., said, 'If it were not for the words "if they shall all die under the age of twenty-one years," I should be of opinion that this must be construed to be an

(*b*) 6 T. R. 30.
(*c*) *Burnsall* v. *Davy*, 1 B. & P. 215.
(*d*) The certificate does not state who were entitled under the contingent remainders, the case not embracing that point.

estate for life in M., remainder in tail to her issue as purchasers, with cross remainders to every one of that family, and then over; but I am at a loss to know what to do with these words. If I were perfectly satisfied with the rejection of the word "amongst" in *Doe* v. *Applin* (*e*), I would reject them, and consider this as a devise over in case the issue of M. should die without leaving lawful issue of their bodies' (*f*).

To H. and his issue, his, her, or their heirs, *equally to be divided.*

"So, in *Doe* d. *Gilman* v. *Elvey* (*g*), where a testator devised his real estate to his wife for life, and after her decease to his son H., *and to the issue of his body* lawfully begotten or to be begotten, *his, her, or their heirs, equally to be divided, if more than one;* and if H. should have no issue of his body lawfully begotten living at his decease, then to A in fee. H. survived the testator's widow, and before he had any issue, suffered a common recovery. The Court considered the case as falling exactly within *Doe* v. *Burnsall*, the devise being in effect to the issue as tenants in common. It was held, however, that *quacunque via data, i.e.*, whether H. took for life or in tail, the title under the recovery was good; the remainders in the former case being contingent, and consequently destroyed by it.

Remarks on *Doe* v. *Burnsall*, and *Doe* v. *Elvey*.

"Of these two cases, it may be observed, that they *decided* nothing more than that A's estate was *either* a contingent remainder after an estate for life, *or* a vested remainder after an estate tail, either of which was defeated by the recovery. The opinion of the Court upon the alternative of these propositions can hardly be considered as an *adjudication* on the point here discussed (*h*).

"As there was no issue of the devisee at the time of the devise taking effect, the testator's bounty could only be made to reach the issue (assuming that word to be intended for a word of purchase), under the joint devise to them and their parent, by giving him an estate tail, unless the gift to the issue were construed as a remainder, which the Court undoubtedly seemed inclined to do; but it is difficult to reconcile such a construction with the principle of the cases establishing that even a devise *to A. and his children* must, under such circumstances, be construed an estate tail, in order to let in the

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(*e*) 4 T. R. 82, *post.*

(*f*) It is evident that the word *issue* in this passage of the judgment is used in two senses, differing in comprehensiveness; for if used as *nomen generalissimum*, in regard to the issue of M., it is clear that such issue could never fail without involving the failure of the issue of such issue. To render the sentence intelligible, we must suppose the learned Judge to mean, in the first instance, either issue of a given class or issue existent within a given period, *i.e.*, either children, or all issue born in the lifetime of the tenant for life, probably the latter.

(*g*) 4 East, 313.

(*h*) [Mr. Jarman's remarks on these cases were approved by Stirling, J., in *Re Wilmot*, 76 L. T. 415.]

children (*i*). If the children could be treated as taking by way of remainder, there is no necessity for having recourse to such a rule. If in such cases the Court is authorised to turn the devise to the issue into a remainder, the cases treated of in the present section cease to exist as a distinct class, and become blended with those which form the subject of the next section. At present, however, the authorities do not warrant any such conclusion, as the two preceding cases are, for the reason already stated, scarcely to be regarded as adjudications on the point, and are unsupported by any subsequent cases. Indeed, in the only case that has since occurred, in which the devise to the issue was concurrent with that to the ancestor, and not by way of remainder, the devisee was held to take an estate tail, although words of limitation in fee were superadded. The case here referred to is *Franklin* v. *Lay* (*k*), where a testator devised to his grandson J., and to the issue of his body lawfully to be begotten *and to the heirs of such issue for ever*, chargeable with a mortgage; but, if his said grandson J. should die without leaving any issue of his body lawfully begotten, then over; Sir J. Leach, V.-C., held it to be an estate tail in J., observing, that the words 'dying without leaving issue' might of course be restrained by other expressions in the will to issue living at the death; as the general words 'in default of issue' might also be, *but not by words of limitation superadded to the issue.*"

To A and to his issue, and to the *heirs* of such issue.

Where there is a gift to A and "to any lawful issue she may have, such issue to take a vested interest in my said property upon attaining the age of twenty-one years," the issue take as purchasers, because the direction that the issue should take vested interests is inconsistent with the use of the word issue as a term of limitation (*l*).

"Although," continues Mr. Jarman (*m*), "there seems to be considerable difficulty in reading a devise to A and his issue, as a devise to A for life with remainder to his issue, even when accompanied with expressions pointing at a mode of enjoyment inconsistent with an estate tail; yet it is not denied that a slight indication of intention in the context would be sufficient to induce such a construction, and the devise would then be brought within the scope of the authorities discussed under the next division."

(*i*) *Wild's Case*, 6 Rep. 16b; *Davie* v. *Stevens*, Doug. 321; *Seale* v. *Barter*, 2 B. & P. 485, *ante*, p. 1865.

(*k*) 6 Mad. 258; 2 Bli. 59, n.

[(*l*) *Re Wilmot*, 76 L. T. 415. In this case A died intestate and unmarried and her heir-at-law became entitled to her real estate, and since she and her issue would have taken the personal estate as joint tenants her legal personal representative was entitled to the personalty.

(*m*) First ed., Vol. II, p. 335.

CHAPTER LI.

But a devise to A and his issue will not create an estate tail if they are merely words introductory to the limitations which follow. Thus in *Re Elton* (*n*), the devise was in trust for C. for life, and after his decease in trust for every son of C. and his issue male in succession, so that every elder son and his issue male might be preferred to every younger son and his issue male, and so that every such son might take an estate for life with remainder to his first and every subsequent son successively according to seniority in tail male, and, in default of issue of C., on similar trusts for F. for life and his issue male, with remainder over. C. died without issue. It was held that F.'s eldest son, born after the testator's death, was tenant in tail male.

A or his issue.

It may here be mentioned that in *Re Clerke* (*o*) a devise of land to A *or* his issue was held to give A an estate tail. This decision is criticised in *Re Whitehead* (*p*).

III.—Devise to A for Life with Remainder to his Issue.—Mr. Jarman continues (*q*), "We come now to the consideration of those cases in which a devise to A *for life*, and after his death to his issue, becomes, by the operation of the well-known rule in *Shelley's Case* (*r*), an estate tail.

To A for life, *remainder* to the issue of his body, held an estate tail.

"One of the earliest cases of this kind is *King* v. *Melling* (*s*), where a testator devised lands to A *for life*, and after his decease he gave the same *to the issue of his body* lawfully begotten on a second wife; and for want of such issue, to B and his heirs for ever, provided that A might make a jointure of the premises to such second wife, which she might enjoy for her life. Twisden and Rainsford, J.J., held it to be an estate for life in A, in opposition to Hale, C.J., who delivered an elaborate and argumentative opinion in favour of an estate tail, which construction was afterwards adopted by all the Judges in the Exchequer Chamber, reversing the judgment of the King's Bench.

To A. and D. for their lives; if either die leaving issue, then to such issue; held an estate tail.

"So, in *Shaw* v. *Weigh* (*t*), where the testator devised lands to his wife for life, and after her decease in trust for his sisters A. and D. equally betwixt them, *during their natural lives*,

(*n*) [1917] 2 Ch. 413; *Re Lord Lawrence*, [1915] 1 Ch. 129; *Re Hobbs*, [1917] 1 Ch. 569. The case of *Re Simcoe*, [1913] 1 Ch. 552, is of doubtful authority.

(*o*) [1915] 2 Ch. 301

(*p*) [1920] 1 Ch. 298, see *ante*, p. 586, n. (*h*).

(*q*) First ed., Vol. II, p. 335.

(*r*) *Ante*, Chap. XLVIII.

(*s*) 1 Vent. pp. 225, 232; 2 Lev. pp. 58, 61. See also *Taylor* v. *Sayer*, Cro. El. 742; [*Jordan* v. *Lowe*, 6 Bea. 350; *Re Keane's Estate*, [1903] 1 Ir. R. 215].

(*t*) 2 Stra. 798; 1 Barn. B. R. 54; 1 Eq. Ca. Ab. 184, pl. 28; 3 B. P. C. Toml. 120. [*Sandes* v. *Cooke*, 21 L. R. Ir. 445. *Vide ante*, p. 1860, n. (*b*).]

Shaw v. *Weigh.*

without committing any manner of waste, and if either of his sisters happened to die *leaving issue or issues of her or their bodies* lawfully begotten, then in trust *for such issue or issues* of the mother's share, or else in trust for the survivor or survivors of them, and their respective issue or issues; and if it should happen that both his said sisters died without issue as aforesaid, *and their issue or issues to die without issue lawfully to be begotten* (*u*), then over. The chief question was whether this was an estate for life, or an estate tail in the sisters. It was adjudged in the House of Lords (affirming a judgment of the Court of Great Sessions for Flintshire, which had been reversed in B. R.) that the devise created an estate tail (*x*).

"In *Ginger* v. *White* (*y*), Willes, C.J., questioned this decision; but subsequent cases have placed its authority beyond all doubt" (*z*).

In *Haddelsey* v. *Adams* (*a*), the devise was to the testator's four granddaughters as tenants in common for life, with benefit of survivorship, the remainder to trustees and their heirs upon trust to support the contingent remainders thereinafter limited, remainder to the issue male of the granddaughters successively lawfully to be begotten, and in default of such issue to the testator's right heirs for ever. Sir J. Romilly, M.R., held that the granddaughters took estates tail.

IV.—Effect of superadded Words of Limitation.—(1) *Limitations to Heirs of same Species as the Issue.*—"It is clear, too," continues Mr. Jarman (*b*), "that *issue* is not converted into a word of purchase by the addition of words of limitation, descriptive of heirs of the same species as the issue described (*c*). Thus, in *Roe* d. *Dodson* v. *Grew* (*d*), where a testator devised unto his nephew G. for his natural life, and after his decease to the use of the *male issue of his body* lawfully to be begotten,

Roe v. *Grew.*

To the *heirs male* of the body of such issue male.

(*u*) As these words would raise an implied gift in the issue of the issue, the case may be classed with those in which words of limitation in tail are superadded to the devise to the issue. See also *Franks* v. *Price*, 3 Bea. 182, *post.*

[(*x*) This seems to have been one of those cases where lay Lords voted on a question of law and decided it against the opinions of a majority of the Judges, only three of whom held it an estate tail, and *nine* an estate for life. See also *Re Taylor's Trusts* (*Taylor* v. *Blake*), [1912] 1 Ir. R. 1 (realty and personalty mixed—issue held to be a word of purchase).]

(*y*) *Willes*, 359, *post.*

(*z*) See cases *passim* in the sequel of this Chapter.

[(*a*) 22 Bea. 266; see also *Warren* v. *Travers*, Ir. R. 2 Eq. 455.]

(*b*) First ed., Vol. II, p. 336.

(*c*) See same rule as to heirs of the body, *ante*, p. 1844. [It has been suggested that the rule only applies to wills before the Wills Act, but it was treated as subsisting in *Pelham Clinton* v. *Newcastle*, [1902] 1 Ch. 34.]

(*d*) 2 Wils. 322; better reported Wilm. 272. See also *Shaw* v. *Weigh*, *supra.*

and the *heirs male of the body of such issue male*, and for want of such male issue, then over. The Court of Common Pleas held that G. took an estate tail: *Wilmot*, C.J., said that the intention certainly was to give G. an estate for life only; but the intention also was, that as long as he had any issue male the estate should not go over (*e*); and if we balance the two intentions, the weightier is that all the sons of G. should take in succession. *Clive*, J., said too great a regard had been paid to the superadded words 'heirs male of the body of such heirs male.' *Bathurst*, J., laid it down as a rule, that where the ancestor takes an estate of freehold, if the word 'issue' in a will comes after, it is a word of limitation. *Gould*, J., observed that the word is used in the Statute *De Donis* promiscuously with the word 'heirs'; *that the term 'issue' comprehends the whole generation as well as the words 'heirs'* (of the body), and, in his judgment, the word 'issue' was more properly a word of limitation than a word of purchase.

"This case (which has always been regarded as a leading authority) seems to have overruled *Backhouse* v. *Wells* (*f*), where the devise was to J. *for his life only*, without impeachment of waste, and after his decease then *to the issue male of his body* lawfully to be begotten, if God should bless him with any, *and to the heirs male of the body of such issue* lawfully begotten; and for default of such issue, over. It was adjudged that J. took an estate *for life*, and that the limitation to the issue was a description of the person who was to take the estate tail.

To the *heirs male of the body* of the issue male.

Observations upon *Roe* v. *Grew* and *Backhouse* v. *Wells*.

"It would be idle to attempt to distinguish *Backhouse* v. *Wells* from *Roe* v. *Grew*, on the ground of the words 'only,' and 'without impeachment of waste,' and 'if God shall bless him with any.' The two first expressions merely show that the testator intended to confer an estate for life, and nothing more, which sufficiently appeared by the express limitation for life, and the last words are obviously implied in every gift of this nature.

"The authority of *Roe* v. *Grew* has been confirmed by the case of *Hodgson* v. *Merest*, where the devise was to A for the term of his natural life, and, after his decease, then to the issue of his body, and to the heirs of the body of such issue, with

(*e*) Or rather that the issue should take it.

(*f*) 1 Eq. Ca. Ab. 184, pl. 27, Fort. 133. [It has been suggested by Sir E. Sugden, 3 Jo. & Lat., at p. 57, that the Court may have considered the word "issue" as used in the singular number, on the ground that according to 10 Mod. 181, the remainder was "to the heirs males of *that* issue." As to "issue" in the singular, see below, p. 1897.]

remainders over; and it was held that A took an estate tail" (*g*).

Pelham Clinton v. *Newcastle.*

In *Pelham Clinton* v. *Newcastle* (*h*) the devise to be construed was "to my son Charles if he marries a fit and worthy gentlewoman and has issue male, to such issue male and their male descendants, in failure of which," over; these words were held to be equivalent to "my son Charles and such issue male as he may have by marriage with a fit and worthy gentlewoman and their male descendants, in failure of which" over. It was held on the authority of *Page* v. *Hayward* (*i*), that Charles took an estate in special tale. It was admitted in argument that the rule in *Shelley's Case* had no application. In the course of his judgment Buckley, J., after referring to *Roe* v. *Grew* (*k*), and *Roddy* v. *Fitzgerald* (*l*), said: "It is, I think, therefore to be presumed that the word 'issue' has been used by the testator as meaning 'heirs of the body' and it is for the parties seeking to give it another meaning to show clearly from the context of the will that the testator intended to give it a different meaning" (*m*).

Superadded limitation to the heirs *general* of the issue.

IV.—(2) *Limitations to Heirs General of the Issue.*—Mr. Jarman continues (*n*): "It is also established, that the addition of a limitation to the heirs *general* of the issue will not prevent the word 'issue' from operating to give an estate tail as a word of limitation (*o*). This position, indeed, may appear to be encountered by the well-known case of *Loddington* v. *Kime* (*p*), where under a devise to A *for life* without impeachment of waste, and in case he should have any issue male, then to *such issue male and his heirs for ever* [and if *he* die without issue male, then to B and his heirs], it was held that A took an estate *for life only*, with a contingent fee to his issue male.

A for life, remainder to issue male and *his* heirs, and if *he* die, over.

To A for life, remainder to his issue male and *their heirs*, held estate tail in A.

"It will require some very fine-spun distinctions to reconcile this case with subsequent decisions. In *King* v. *Burchell* (*q*)

(*g*) 9 Price, 556. [So stated in marginal note only. See also *Irwin* v. *Cuff*, Hayes, 30; with which compare *Hockley* v. *Mawbey*, 1 Ves. jun. 143.

(*h*) [1902] 1 Ch. 34; affirmed, [1903] A. C. 111.

(*i*) 2 Salk. 570; Pigott on Recoveries, 176.

(*k*) 2 Wils. 322; Wilm. 272.

(*l*) 6 H. L. C. 823.

(*m*) Buckley, J.'s judgment was adopted by Lords Halsbury and Macnaghten in the House of Lords.

(*n*) First ed., Vol. II, p. 338.

(*o*) This statement is quoted with approval by Chitty, J., in *Williams* v. *Williams*, 51 L. T. 779. See the same rule to heirs of the body, *ante*, p. 1844.]

(*p*) 1 Salk. 224; Ld. Raym. 203; [3 B. P. C. Toml. 64 *nom. Barnardiston* v. *Carter*.]

(*q*) 1 Ed. 424, Amb. 379. [The devise here referred to is the second one in the will, namely, of the Maidstone estate. The case, so far as it relates to the first devise, properly belongs to the next division of this section. No distinction was taken between the two, though, as we shall hereafter see, they would now be considered to have different effects.

the testator devised [his houses at Maidstone] to J. *for his life*, and after the determination of that estate unto the *issue male of the body of* J. lawfully to be begotten, *and to their heirs*, and for want of such issue, over; and if J. or his issue should alien the premises, they were charged with £2,000; Lord Keeper Henley held that J. was tenant in tail, and that the proviso was repugnant and void: his Lordship distinguished *Loddington* v. *Kime* because there the remainder was expressly contingent"; [and because the word "his" was used instead of the word "their" in the limitation to the heirs of the issue, whereby it appeared that one particular person was pointed at, and that all the issue were not intended to take. This force of the word "his" is noticed by Lord Raymond in *Goodright* v. *Pullyn* (*r*), where, however, he referred the word to the ancestor. If *Loddington* v. *Kime* is referable to these special grounds, it is not opposed to the position above laid down. As to the other distinction taken by the Lord Keeper], "is not, it may be asked, every remainder to a class contingent in this sense, namely, as respects the event of there being objects to claim under it? Upon this principle Sir W. Grant in *Elton* v. *Eason* (*s*), held that the words "if any," annexed to a limitation to the heirs of the body, did not vary the construction. It is futile, therefore, to attempt to preserve *Loddington* v. *Kime* by any such distinction. The case is clearly overruled.

Loddington v. *Kime* distinguished by Henley, L.K.

Remark on *Loddington* v. *Kime*.

"Another decision, which may seem to militate against the rule before laid down in *Doe* d. *Cooper* v. *Collis* (*t*), where a testator devised to his daughter E., and to S. the wife of W., to be equally divided between them, not as joint-tenants, but as tenants in common, *viz.*, the one moiety to E. and her heirs for ever, and the other moiety to S. for the term of *her natural life*, and after her decease *to the issue of her body* lawfully begotten *and their heirs* for ever. (There was no devise over.) The question was whether S. took an *estate tail* or an estate for *her life*, with remainder in fee to her children (*u*); and the Court decided in favour of the latter construction, Lord Kenyon observing that issue was either a word of purchase or of limitation, as would best answer the intent of the devisor; and his Lordship remarked that the property was *to be equally divided*, which it would not be if S. were held to take an estate tail; for, in

To S. for life, remainder to her issue and *their heirs*, held estate for life in S.

(*r*) 2 Stra. 729, stated *ante*, p. 1845. And see *per* Sir. E. Sugden, 3 Jo. & Lat., at p. 57, cited below, p. 1896, n. (*f*).]

(*s*) 19 Ves. 73. [See also *Marshall* v. *Grime*, 28 Bea. 375.]

(*t*) 4 T. R. 294.

[(*u*) This case is not an authority that "issue" in such a limitation is to be read "children," for it does not appear that there were any other issue who could have taken; it is most probable there were not, as the eldest child was only sixteen when S. levied a fine *sur conuzance*, etc.]

that case, the reversion in fee of that moiety would be again subdivided between the heirs of the two daughters.

Remark on *Doe* v. *Collis.*

"It is difficult to accede to the reasoning which ascribed to the words of division this influence on the construction, since they were merely applied to the *corpus* of the land, not to the inheritance. At all events, it is enough for our present purpose to show that the case was decided upon special grounds, and not in opposition to the doctrine that a limitation to the heirs of the issue superadded to the devise to the 'issue' is inoperative to vary the construction. As such, indeed, it would have been clearly overruled by subsequent cases.

To A for life, remainder to his issue and to the *heirs and assigns* of such issue, held an estate tail in A.

"Thus, in *Denn* d. *Webb* v. *Puckey* (*x*), the testator devised to his grandson N. *for life* without impeachment of waste, and after his decease *to the issue male of his body* lawfully begotten, and *to the heirs and assigns of such issue male for ever;* and in default of *such* issue male, then over. N. suffered a recovery, and the question raised was whether, under the devise, he was tenant in tail or tenant for life only. The Court held that the general intention of the testator was that the male descendants of his grandson N. should take the estate, and that none of those to whom the subsequent limitations were given should take until all such male descendants were extinct; and, to effectuate this, it was necessary to give him an estate tail; for, if his issue took by purchase, Lord Kenyon thought it would be difficult to extend it to more than one (*y*), and that even if the words comprehended all the male issue as tenants in common in tail, yet that would not have answered the devisor's intention, because there were no words to create cross-remainders between them (*z*). But it was held it was, even if the issue would have taken by purchase; yet that, being a contingent remainder, it was destroyed by the recovery which was suffered before the birth of issue, so that the defendant who claimed under the recovery, was entitled *quacunque via data* (*a*).

(*x*) 5 T. R. 299.

(*y*) His Lordship is made to say, "It has been contended that N. took only an estate for life; if so, what estate was given by the words, 'to the issue male of his body lawfully begotten, and the heirs and assigns of such issue male?' Was it to extend to more than one son? It would be difficult to extend it to more than one, and I conceive that the eldest must have taken the *absolute interest in the estate.* But that would have defeated the devisor's intention, because if it had *descended* (*Qu.* devolved?) to that one son, and he had died without making any disposition of it, it would have gone over to the other sons of the devisor," *i.e.*, by descent, for if it were a devise in fee to the son, of course no remainder could be limited on that estate.

(*z*) They would clearly have been implied, but there seem to have been insuperable obstacles to the suggested construction.

[(*a*) Since 8 & 9 Vict. c. 106, s. 8, no act of the tenant for life before issue born can now destroy subsequent contingent remainders. See *ante*, p. 1417.

CHAPTER LI.

To B for life, remainder to his issue male *and their heirs*, held an estate tail.

"So, in *Frank* v. *Stovin* (*b*), where a testator devised to B *for life*, without impeachment of waste, with power to make a jointure to any future wife, and after his decease then *to the use of the issue male of the body of B* lawfully begotten and to be begotten *and their heirs;* and in default of such issue, then over. B had issue, and afterwards suffered a recovery. Lord Ellenborough was of opinion that the case was governed by *Roe* v. *Grew*, and accordingly that B took an estate tail."

And if the addition of formal words of inheritance will not prevent the word issue from operating as a word of limitation, still less (*c*) will informal words do so though sufficient to carry the inheritance, such as "all my interest" (*d*) or "for ever" (*e*).

Effect of limitation over "in default of such issue."

It should be observed that in *Frank* v. *Stovin* (*f*), Le Blanc, J., made a distinction between that case and *Denn* v. *Puckey* (*g*) and the case of *Doe* v. *Collis* (*h*), by reason of the limitation over "in default of *such* issue," which occurred in the former of those cases. This distinction has been the subject of much discussion. On the one hand reference is made to the cases discussed in the next chapter establishing that this expression, following a devise to any class of issue, refers to those objects; and it is argued that if in the case of a devise to sons or children, and in default of such issue over, the clause introducing the devise over is inoperative to vary the construction of the prior devise, how can it have more power where following an express devise to issue explained by the context to mean sons or children? The two cases, it is said, are identical in principle: and to say that the words "in default of such issue" refer to the objects of the prior devise, whoever they may be, and that those objects mean issue indefinitely by the effect of the words in question, seems very much like reasoning in a circle (*i*). The answer is, that when it is a question whether the general term "issue" is or is not explained by the context

(*b*) 3 East, 548. [See also *Sturge* v. *Sturge*, 12 Bea. 229.
(*c*) See *Fuller* v. *Chamier*, L. R. 2 Eq. 682, *ante*, p. 1805, n. (*m*).
(*d*) *Manning* v. *Moore*, Alc. & Nap. 96.
(*e*) *Griffiths* v. *Evan*, 5 Bea. 241.]
(*f*) 3 East, at p. 551.
(*g*) *Ante*, p. 1899.
(*h*) *Ante*, p. 1898.
(*i*) [The argument is Mr. Jarman's who concluded that,] if in *Doe* v. *Collis* "issue" was properly construed to mean children, the words "in default of *such* issue" in *Denn* v. *Puckey* and *Frank* v. *Stovin* (and we may add in *Mogg* v. *Mogg*) ought, according to the class of cases just mentioned, to have been read "in default of such *children*." But, as they were not so construed, the inevitable conclusion is that *Doe* v. *Collis*, so far as it rests on this distinction, is overruled. [The whole argument was obviously directed against Lord Kenyon's method of dealing with these cases, *viz.*, first inferring from the superadded words of limitation or distribution, without taking into

to mean children, the *whole* context must be taken into account, and that it is no more permissible to exclude the words "in default of such issue" from consideration than any other part of the context. Nearly every Judge who has had to construe a devise to issue, and has found such a clause in the will, has expressly relied on it as one ground for giving the ancestor an estate tail; and in *Woodhouse* v. *Herrick* (*k*), Sir W. P. Wood distinctly asserted its importance as a material part of the context. Of course its absence is not conclusive in favour of construing "issue" as a word of purchase, and falls far short of reconciling *Doe* v. *Collis* with other authorities, which have established that a devise to A for life, remainder to his issue and the heirs of such issue, with or without a limitation over, confers an estate tail on A (*l*). Lord St. Leonards is sometimes cited as if he had laid down a contrary rule: but what he says is "a devise to A for life, with remainder to his issue, with superadded words of limitation *in a manner inconsistent with a descent from A* will give the word issue the operation of a word of purchase" (*m*). In *Morgan* v. *Thomas* (*n*), land was devised to L. "for life and after his decease to his lawful issue and their heirs for ever if any," and "if he should die without having any *children* born in wedlock" then to E. and his heirs. The Court of Appeal, affirming the decision of Cave, J. (*o*), held that L. took an estate for life only, not an estate tail.

Superadded words of limitation which change the course of descent.

IV.—(3) *Limitations changing the Course of Descent.*—But, as already shown (*p*), if the superadded words of limitation narrow the course of descent, they convert even "heirs of the body" into words of purchase, since "it is absolutely impossible by any implied qualification, to reconcile the superadded words to those preceding them, so as to satisfy both by construing the first as words of limitation" (*q*). This principle appears to be equally applicable where the prior word is "issue." In *Hamilton* v. *West* (*r*) where there was a devise to A for life, with remainder

To A for life, with remainder to her issue female and the heirs of their bodies.

account the gift over in default of issue, that "issue" was used for "children" (which he called the particular intent), and then sacrificing that in order to give effect to the "general intent," which he inferred from the gift over in default of issue: see further Chap. LII.

(*k*) 1 K. & J. 352.

(*l*) See acc. *per* Lord Cranworth, *Parker* v. *Clarke*, 6 D. M. & G., at p. 109; Hayes, Inq. 302. Cf. *Phillips* v. *James*, 2 Dr. & Sm. 404; 3 D. J. & S. 72 (executory articles for settlement).

(*m*) *Montgomery* v. *Montgomery*, 3 Jo. & Lat. 47. In *Bowen* v. *Lewis*, 9 A. C., at p. 902, Lord Selborne pointed out that the presence or absence of words of distribution is material in assisting the construction.

(*n*) 9 Q. B. D. 643.

(*o*) 8 Q. B. D. 575.

(*p*) *Ante*, p. 1848.

(*q*) Fea. C. R. 184.

(*r*) 10 Ir. Eq. Rep. 75; see also *Dodds* v. *Dodds*, 11 Ir. Ch. 374.

to her first and other sons in tail male, with remainder "to the issue female of the said A and the *heirs of their bodies*, with remainder over": it was held, by Smith, M.R., Ir., that A did not take an estate in tail female expectant on the estates tail of her first and other sons, but that the daughters of A took estates in tail general by purchase, the limitation to the heirs general of the bodies of the issue being inconsistent with an estate in tail female in the ancestor.

Here, it will be observed, the superadded words of limitation (heirs of the body) were more extensive than those upon which they were engrafted (issue *female*), and might have been satisfied in a qualified sense without attributing to them the effect of changing the course of descent; just as in the case of a devise to A for life, remainder to his issue or to the heirs of his body *and their heirs general*, in which case "issue" is a word of limitation notwithstanding the superadded words, the reason given being that "the superadded words are not contrary to or incompatible with the preceding, but in their general sense include them; and there is no improbability in the supposition that they were used by the testator in the same qualified sense as the preceding; and then both may be satisfied, by taking the first as words of limitation" (*s*). However, this construction does not appear to have been applied in any decided case where the superadded words indicate a special course of descent, less general than one in fee simple; and it is not improbable that the doctrine of *Hamilton* v. *West* will be supported as well where the preceding words are "male" or "female heirs of the body" as where the more flexible term "issue" is used.

Words of distribution inconsistent with an estate tail.

V.—Effect of Words of Distribution and Modification.—Mr. Jarman continues (*t*): "It might seem upon principle to follow that words of distribution annexed to the devise to the issue, or any other expressions prescribing a mode of enjoyment inconsistent with the course of descent under an estate tail, would be no less inoperative than superadded words of limitation to turn '*issue*' into a word of designation."

With regard to the effect of express words of limitation superadded to words of distribution in a gift to issue, the rule is thus stated by Parke, J., in *Slater* v. *Dangerfield* (*u*), "Where there is a devise to one for life with remainder to his issue as *tenants in common* with a limitation to the heirs general of the issue, the issue take as purchasers in fee."

(*s*) Fearne, C. R. 184, *ante*, p. 1848.
(*t*) First ed., Vol. II, p. 345.
(*u*) 15 M. & W., at p. 273, *post*, p. 1906.

Lees v. *Mosley.*

"The leading case on this point," continues Mr. Jarman (*x*), "is *Lees* v. *Mosley* (*y*), where a testator devised certain lands unto his two sons, Henry James and Oswald Fielden, in moieties as tenants in common, in such manner and subject to such charges as thereinafter mentioned, that is to say, as to one moiety thereof, to his son Henry James for life, *with remainder to his lawful issue and their respective heirs, in such shares and proportions, and subject to such charges as he* (*H. J.*) *should by deed or will appoint; but in case his son Henry James should not marry and have issue, who should attain the age of twenty-one years*, then he devised the said moiety to his son Oswald and his heirs for ever. And, as to the other moiety of the property, the testator devised the same to his son Oswald and his heirs absolutely for ever. At the date of the will, and at the death of the testator, Henry James Fielden was a bachelor. He suffered a recovery of his moiety, and the question (raised in an action between vendor and purchaser) was as to the validity of the title derived under such recovery. The case was elaborately argued, the plaintiff contending that, according to the true construction of the will, there was a gift to the parent for life, with remainder to the children in fee; and the defendants insisting that Henry James Fielden took an estate tail. The Court decided that he was tenant for life only. Mr. Baron Alderson, (who delivered the judgment of the Court,) drew a distinction between a devise to *heirs of the body*, which he considered were technical words, admitting but of one meaning, and a devise to *issue*, which he characterised as a word in ordinary use, not of a technical nature, and capable of more meanings than one; observing that it was used in the Statute De Donis both as synonymous with children and as descriptive of descendants of every degree, and though the latter might be its *prima facie* meaning, yet the authorities showed that it would yield to the intention of the testator to be collected from the will, *and that it requires a less demonstrative context to show such intention than the technical expression 'heirs of the body,' would do.* The learned Judge then proceeded as follows :—'The Court in the present case have to look to the terms in this will, in order to ascertain whether, by construing the word "issue" here as a word of purchase or of limitation, they best effectuate the intention of the devisor. The testator begins by devising an express estate for life to his son Henry James. He then devises in remainder to his lawful issue. If it stopped there, it would

To H. for life, with power of distribution in fee in favour of issue, and limitation over, in case of being no issue who should attain twenty-one, held estate for life in H.

Judgment of Alderson, B., in *Lees* v. *Mosley.*

(*x*) First ed., Vol. II, p. 347.]

(*y*) 1 Y. & C. 589. [See *M'Kenna* v. *Eager*, Ir. R. 9 C. L. 79 (chattel real).]

be an estate tail. For the word "issue" might include all descendants; and here all being unborn, no assignable reason could exist for distinguishing between any of them. And then the rule in *Shelley's Case* would apply, and would convert the estate for life, previously given, into an estate tail. But the testator then adds, "and their respective heirs in such shares and proportions and subject to such charges as he the said Henry James should by will or deed appoint." Now, according to the case of *Hockley* v. *Mawbey* (z), the effect of this clause would be to give the objects of the power an interest in an equal distributive share, in case the power were not executed. The clause, therefore, is equivalent to a declaration by the testator, that the issue and their respective heirs should take equal shares, but that Henry James should have a power of distributing amongst them the estate, in unequal shares, if he thought fit. Now, if issue be taken as a word of limitation, the word "heirs" would be first restrained to "heirs of the body," and then altogether rejected as unnecessary. The word "respective" could have no particular meaning annexed to it; and the apparent intention of the testator to give to Henry James for life, and afterwards to distribute his property in shares amongst the issue, would be frustrated. On the other hand, if issue be taken as a word of purchase, designating either the immediate issue or those living at the death of Henry James, the apparent intention will be effectuated, and all these words will have their peculiar and ordinary acceptation. If, then, the will stopped here, it would seem clear that the Court ought to read "issue" as a word of purchase. Then comes the devise over. "But in case my son Henry James shall not marry and have issue who shall attain the age of twenty-one, then I give and devise to my son Oswald in fee." Now, the effect of such a clause, if superadded to a remainder to children, would be to show an intention to give a fee to the children on their attaining twenty-one. And if by the former part of the will the same estate has been given, it does not appear to be sound reasoning to draw the conclusion that such a clause can convert the estate previously given into an

(z) 1 Ves. jun. 143; 3 B. C. C. 82 (where the will is stated at length). [In that case the devise was to A for life, and after her decease to B and his issue to be divided among them as he should think fit, and in case he should die without issue, over. Lord Thurlow held that B took an estate for life only. Assuming that the words were sufficient to carry the fee to the issue as purchasers, the decision agrees with later cases. The gift to the issue was not expressly by way of remainder, but could not, it is conceived, be read otherwise. The case is generally treated as one in which the issue taking by purchase might have taken the fee by implication in default of appointment, see *Kavanagh* v. *Morland*, Kay, at p. 25; Prior on Issue, p. 117; *Re Wilmot*, 76 L. T. 415; but except as to the property described as the testator's "reversion" this point does not seem free from doubt. See Sugd. Pow. 400, 594 (8th ed.); and *ante*, p. 628.]

estate tail. In fact, the case of *Doe* v. *Burnsall* (*a*) is a distinct authority on this part of the case. Upon the whole, therefore, we have no doubt in this case that the testator's intention was not to give his son an estate tail, and we think that we best effectuate that intention by construing the words "lawful issue" in this will, accompanied by their context, as words of purchase; and, in so doing, we do not impugn the authority of any decided case to be found in the books; for there is not one in which these words, with such a context as in this will, have been held to be words of limitation.'

Remark on *Lees* v. *Mosley*.

"The case of *Lees* v. *Mosley*, may be considered as deciding that under a devise to A for life, with remainder to his [issue and their respective heirs,] in such shares as he shall appoint, with a limitation over in case of his dying without issue who should attain majority, the issue take estates in fee as tenants in common, and A is not tenant in tail. It may be also collected from the judgment, that the Court (or at least the very learned Judge who delivered it) would have arrived at the same conclusion if the devise to the issue had been simply to them as tenants in common in fee, without any devise over; in other words, that if a testator devises lands to A for life, with remainder to his issue and their heirs in equal shares, or as tenants in common, the effect is to give to A an estate for life, with remainder to the issue in fee. If, however, the devise was so framed as that the issue, if they took as purchasers, would have an estate for life only (a circumstance which is less likely to occur under a will made or republished since 1837 than any other), it is conceded that the leaning to the construction which makes 'issue' a word of purchase would be less strong, and the fate of the devise [was, thus far, left] uncertain."

To A for life, with remainder to his issue as tenants in common in fee. Held, issue take by purchase.

So, in *Greenwood* v. *Rothwell* (*b*), the devise was to Jonas Greenwood for life, and after his decease unto *all and every the issue* of the body of the said Jonas, *share and share alike, as tenants in common*, and the heirs of such issue. On a case sent for the opinion of the Court of Common Pleas the Judges certified that Jonas Greenwood took only an estate for life; and Lord Langdale, relying on the direction that the issue should take share and share alike, and on the words of limitation superadded, and adverting also to the absence of a gift in default of issue, affirmed their decision (*c*).

(*a*) 6 T. R. 30, *ante*, p. 1891.
(*b*) 5 M. & Gr. 628; 6 Scott, N. R. 670.
(*c*) 6 Bea. 492.

Again, in *Slater* v. *Dangerfield* (*d*), where the devise was to G. D. for life, and from and immediately after his decease unto and to the use *of all and every the lawful issue* of the said G. D., *their heirs and assigns* for ever, as tenants in common and not as joint-tenants, when and as he, she or they should attain his, her or their age or ages of twenty-one years. There was no devise over in default of issue, but the will contained a general residuary devise which would have comprised the interest (if any) undisposed of under the first gift. The Court of Exchequer held that G. D. took an estate for life only, and relied upon *Greenwood* v. *Rothwell*, as being exactly in point, and on *Lees* v. *Mosley* as going even further, inasmuch as in that case there was what was not found in the case before the Court, namely, a devise over: for the residuary devise was not equivalent.

To children and the survivors and survivor for life, and then to their lawful issue, and the heirs of the body of such issue, with cross remainders between the issue. Held, that the children took for life

And it has been held that the rule under consideration applies where in a devise to issue words of distribution are followed by words of limitation appropriate for carrying an estate tail. In *Parker* v. *Clarke* (*e*), where lands were directed to be conveyed upon trust for the children of the testator's niece during their lives, and for the survivors or survivor of them during their, his or her lives or life, and after the decease of the last survivor

(*d*) 15 M. & Wels. 263. See also *Golder* v. *Cropp*, 5 Jur. (N.S.) 562; *Crozier* v. *Crozier*, 3 D. & War. 373; 2 Con. & L. 309; *Montgomery* v. *Montgomery*, 3 Jo. & Lat. 47; *Morgan* v. *Thomas*, 8 Q. B. D. 575. These cases must be considered to have overruled *Mogg* v. *Mogg*, 1 Mer. 654, if at least that case proceeded on the ground that "issue" was to be read as a word of limitation, notwithstanding the addition of words of distribution as well as of words of limitation.] In *Mogg* v. *Mogg* a testator devised the residue of his messuages, etc., equally among the child or children begotten and to be begotten of S. *during his, her and their life and lives*, and after the decease of such child and children he gave the same *unto the lawful issue* of such child and children of S., to hold unto such issue *his, her and their heirs* as tenants in common without survivorship, and in default of issue, over; the Court of K. B., on a case from Chancery, certified that the children of S. took *estates tail*. [Mr. Jarman (p. 341, n. (*t*)), said that he cited *Mogg* v. *Mogg* "with diffidence on account of the impossibility of ascertaining the precise ground on which it was decided; for as the] limitation to the issue, as purchasers, of children born and to be born would have transgressed the rule against perpetuities; this circumstance may have induced the Court to apply the doctrine of *cy-près*, but to which there seems to be this objection, that it would extend the doctrine (which all agree has already been carried quite far enough) to cases in which an estate in *fee simple* is given to the issue, in opposition to the rule considered to have been established by the authorities (Vol. I, p. 265); besides which if the Court saw a very decided reason for holding issue to be a word of purchase, why was not the devise restricted to the children (and the issue of children) who were born in the lifetime of the testator, as was done (though perhaps unwarrantably) in certain other devises in the same will, under which the ancestor took an equitable interest only and the issue a legal remainder (*ante*, p. 1563), which two limitations, being of different quality, could not unite by force of the rule in *Shelley's Case?*" [In the following cases, the devisees were held, having regard to the context of the wills, to take estates tail, *viz.*, *Doe* d. *Cannon* v. *Rucastle*, 8 C. B. 876; *Kavanagh* v. *Morland*, Kay, 16; *Woodhouse* v. *Herrick*, 1 K. & J. 352; *Roddy* v. *Fitzgerald*, 6 H. L. C. 823.]

(*e*) 3 Sm. & G. 161; 6 D. M. & G. 104.

of the said children, then in trust for all and every the lawful issue male and female of such of the children of his niece then or thereafter to be born as should be living at the testator's decease, in equal shares and proportions as tenants in common and not as joint-tenants, and the heirs of the body and respective bodies of all and every the issue of the said children; and on the death and failure of heirs of the body of any one or more of the issue of the said children, as well the original share or shares of him, her or them so dying, and of whom there should be such a failure of heirs of the body as aforesaid, as also such share or shares as should accrue to him, her or them, or his, her or their issue, should be in trust for the survivors and survivor and others or other of them, if more than one in equal shares as tenants in common and not as joint-tenants, and for the heirs of the body or respective bodies of such surviving issue, and for default of issue to inherit under the preceding limitations, then upon certain other trusts. It was held by Lord Cranworth, C., affirming the decision of Sir J. Stuart, V.-C., that the children of the nieces took estates for life only.

General rule as to such wills.

The law on this point as to wills made since 1837 may be reduced to a very simple general rule,—namely, that *every* devise to a person for life and after his decease to his issue, in words which direct or imply distribution between the issue, gives the issue an estate in fee in remainder by purchase.

Whether "issue," where a word of purchase, is confined to *children*.

"It is observable" Mr. Jarman remarks (*f*), "that, in *Lees* v. *Mosley* (and the same remark applies to many other cases), it does not distinctly appear whether, in pronouncing 'issue' to be a word of purchase, the Court intended to construe it as synonymous with *children*, or as admitting descendants of every degree (*g*). The latter, it is presumed, would be its

[(*f*) First ed., Vol. II, p. 352.]

(*g*) The case of *Dalzell* v. *Welch*, 2 Sim. 319, seems to bear upon this point, and favours the more enlarged construction of the term "issue."

A moiety of certain real estate was devised to D for life, remainder to and among his issue as he should by will appoint, remainder to his issue living at his death, in fee. D made an appointment in favour of his children only, though he left also grandchildren and great-grandchildren. Sir L. Shadwell, V.-C., held the appointment to be invalid, on the ground of its excluding the donee's grandchildren and great-grandchildren, who were objects of the power, as being included under the denomination of issue. The chief argument for the contrary construction was founded on a previous part of the will, in which the testator had bequeathed personalty to A for life, and, in case she should leave *issue* living, then to be paid and applied among *such child or children* in such proportions, etc., as A should appoint; and, in default of appointment, among *such issue* in equal shares, and, if but one *child*, the whole to be paid to such one; and, in case there should be no issue of A living at her decease, or if they should all die before attaining twenty-one, then over. The Vice-Chancellor thought that the word "children" meant *issue* in this instance, for that the testator could not intend that, if A left a grandchild and no child, the property should go over. *At all events, as a similar phraseology was not adopted in the latter part of the will, the*

construction in the absence of a restraining context (*h*). What amounts to such a context will be the subject of consideration in the next section, which this remark will serve to introduce."

"Issue" explained to mean *sons*.

VI.—Effect of clear Words of Explanation—Issue synonymous with Sons or Children.—"If the testator annex to the gift to the issue words of explanation, indicating that he uses the term 'issue' in a special and limited sense, it is of course restricted to that sense.

"As in the case of *Mandeville* v. *Lackey* (*i*), where a testator devised his real estate in certain counties to K. during his life only, subject to a certain condition, and after the determination of that estate to M.'s *lawful issue male*, and the lawful issue male of such heirs, the eldest always of *such sons* of M. to be preferred before the youngest, according to their seniority in age and priority in birth, and for want of such lawful issue in M., over: the Court of King's Bench in Ireland held that M. took only an estate for life, which was affirmed in the House of Lords, with the unanimous concurrence of the Judges, on the ground that the word 'issue' was explained to mean 'sons.' The Lord Chancellor said the subsequent words of explanation seemed to him to point out the *sons* of M. by name, as the persons whom the testator meant by issue male.

"Issue" explained to mean *children*.

"So, in the case of *Ryan* v. *Cowley* (*k*), where a testator devised and bequeathed to trustees freehold and leasehold and other personal property, upon trust for his daughter for life; and after her decease the rents and profits, and interest of money, he gave, devised, and bequeathed to and amongst the *issue* of his said daughter lawfully to be begotten, in such shares and proportions as she should by her last will and testament appoint, provided such *child or children* should arrive at the age of twenty-one years; and for want of such issue of his daughter, or in case of the death of such issue, and of the death of his wife, the testator devised all his property to other persons. It was contended on behalf of the daughter that the word 'issue' was to be construed as a word of limitation, and consequently that she took an estate tail in the freehold, and an absolute

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word "issue" must be considered as used in the sense it generally bears. [Compare this with *Ryan* v. *Cowley*, and *Carter* v. *Bentall*, *supra*, and p. 1909. And see *Hill* v. *Nalder*, 17 Jur. 224.]

(*h*) As to the mode in which the several degrees of issue take in such cases, see *ante*, pp. 1561 *seq.*

(*i*) 3 Ridg. P. C. 352, Hayes's Inq. 145, n. See same principle as to *heirs of the body*, *Goodtitle* d. *Sweet* v. *Herring*, 1 East, 264, and other cases stated *ante*, pp. 1857 *seq.*

(*k*) 1 Ll. & G. *t.* Sugden, 7. See also *Machell* v. *Weeding*, 8 Sim. 4; *Pruen* v. *Osborne*, 11 Sim. 132; [*Bradshaw* v. *Melling*, 19 Bea. 417.

interest in the chattel property. But the Lord Chancellor (Sugden) held that the daughter took a life interest only. 'The term "issue" ' (he observed) 'may be employed either as a word of purchase or of limitation; but when the testator adds, "provided such child or children shall attain twenty-one, and for want of such issue, then" over, he translates his own language, and clearly shows that he uses the word "issue" as synonymous with child or children.' "

So, in *Bradley* v. *Cartwright* (*l*), where land was devised to S. B. for life, remainder to trustees to preserve contingent remainders, remainder to the use of *all and every the issue child or children* of the body of S. B., in such shares, manner and form as S. B. should by deed or will appoint, and in default of such issue, over; it was held that "issue" was explained to mean children.

"Issue" not explained to mean children.

But in *Roddy* v. *Fitzgerald* (*m*) the words "if only one child to such only child" were held insufficient to limit the generality of the term "issue"; for although "issue" included children, it did not follow that it included none besides. The testator "certainly meant (said Lord Cranworth) that if there was only one child, that child should take. But that the child would do consistently with the intention that the estate should go to the issue through all time of the first taker" (*n*).

"Issue" explained to mean *children*.

Mr. Jarman (*o*) also cites the "case of *Carter* v. *Bentall* (*p*), where a testator gave the dividends of certain stock to his wife for life, and gave the income of the residue of his personal estate and the rents of his real estate to his daughter for her life; and after the death of his wife and daughter he gave the residue of his real and personal estate to trustees, upon trust to sell and to transfer one moiety of the produce to the issue of his daughter in equal shares, to be paid to them at their respective ages of twenty-one; and if only one *child* then to such one *child*, for his, her, or their benefit; and the testator ordered the trustees to lay out the dividends in the maintenance of such 'issue'; and in default of such issue, over (*q*): Lord Langdale, M.R., held that the word 'issue' was here explained to mean *children*."

(*l*) L. R. 2 C. P. 511. See this case observed on by Cotton, L.J., *Richardson* v. *Harrison*, 16 Q. B. D. 85, at p. 108. See also *Farrant* v. *Nichols*, 9 Bea. 327 (personalty);] and see a similar construction applied to articles for a settlement: *Campbell* v. *Sandys*, 1 Sch. & Lef. 281.

[(*m*) 6 H. L. C. 823.

(*n*) Applying what Lord Eldon said in *Jesson* v. *Wright*, with reference to "heirs of the body," *ante*, p. 1851.]

(*o*) First ed., Vol. I, p. 355.

(*p*) 2 Bea. 551.

(*q*) The chief discussion was, whether, in respect of the *other* moiety, a gift over on failure of issue of the testator's mother and daughter (to whose children no gift was made), the word "issue" was to be read "children," and it was held not.

CHAPTER LI.

Distinction between real and personal property.

After *Roddy* v. *Fitzgerald*, this cannot be considered an authority upon the construction of such terms in a gift of real estate, unless it can be distinguished by reason of the trust for sale, which certainly seems inconsistent with the existence in the daughter of an estate tail in one moiety. But personalty differs from realty in this, that it is not descendible but distributable: the use of the word "issue" in a gift of personalty as an equivalent for "heirs of the body" is, therefore, a misapplication of it which suggests the probability that it was not intended to be so used; and thus the case is freed from the chief considerations which have prevented the word when used in a gift of realty from receiving a restricted meaning from the context. *Carter* v. *Bentall* was followed by Sir C. Hall, V.-C., in a case (*r*) where personalty was given to A for life, and after his death to his issue surviving him, equally if more than one, and "if but one (*i.e.*, one issue) then for *such* only *child*," with a gift over "in default of issue becoming entitled to" the legacy. And of course where personalty was bequeathed to several for their lives, and after the death of each leaving issue her share to be paid to such issue, *if more than one child* equally to be divided between them, it was held that "issue" was explained to mean children (*s*).

Even a devise of real estate worded as in the last case would, according to *North* v. *Martin* (*t*), be construed in like manner. The case at least would be quite different from *Roddy* v. *Fitzgerald*, since a plurality of children taking as tenants in common would not be consistent with an estate descending from A.

Effect where "issue" and "children" have elsewhere been used indifferently.

Mr. Jarman continues, "And of course it is a circumstance favourable to the construction in question, that the testator has in other parts of his will used the words 'children' and 'issue' indifferently (*u*). Indeed, in a very recent case, it was considered to be a conclusive ground for construing the word 'issue' to mean *children*, that the testator had elsewhere employed it in a limited sense (*x*).

"But of course the word 'issue' will not be cut down to *children* by the mere circumstance of the words 'children' and 'issue' being previously used synonymously, if in those prior

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[(*r*) *Re Hopkins' Trusts*, 9 Ch. D. 131.

(*s*) *Bryden* v. *Willett*, L. R. 7 Eq. 472. As to the general rule that in a bequest of personalty to A for life, remainder to his issue, "issue" is not a word of limitation, see *ante*, Chap. XXXIII, p. 1162.

(*t*) 6 Sim. 266, stated *ante*, p. 1858.

(*u*) *Cursham* v. *Newland*, 2 Bing. N. C. 58; 2 Scott, 105; 2 Bea. 145; 4 M. & Wels. 101.

[(*x*) *Ridgeway* v. *Munkettrick*, Dr. & War. 84. (As to Sugden, L.C.'s, rule or supposed rule laid down in this case, see *ante*, p. 1575).

instances there was fair ground to conclude that both terms were used in the sense of issue (*y*).

"Children" held to mean *issue*.

"A leading and often-cited example of the word 'children' being used in the sense of *issue*, is *Gale* v. *Bennet* (*z*), where a testator gave real and personal estate to his daughter H. for life, and remainder to her children at twenty-one; and, in default of such issue, then to his other daughters that should be living at the time of the death and failure of issue of H., and the *child or children* of such of his other daughters as should be dead, as tenants in common in fee; but such children to take only their parent's share; but in case there should be none of his other daughters, nor any *issue* of his other daughters then living, the testator bequeathed over the property. H. died childless; and it was held that the grandchild of another daughter who died in the lifetime of the testator, was entitled, the word child and children being here used as synonymous with *issue* (*a*).

Bequest to children made to govern prior gift to "issue."

"The present section will be concluded by the statement of two recent cases of the converse kind, namely, in which the word 'issue' has been used in the restricted sense of *children*. In one of these, *Ellis* v. *Selby* (*b*), a testator bequeathed his funded property upon trust for A for life, and after his decease, should he have *issue* lawfully begotten, whether male or female, to pay the interest for the maintenance and education of such *issue*, if more than one share and share alike, and if only one for the maintenance of such one, during his, her or their nonage; and, on their attaining the age of twenty-one years, to transfer the same to them if more than one, and, if only one then to such one; and, after the decease of B. (to whom the testator had given the dividends on his Bank stock for life), he gave the dividends thereof to A for the term of his life, and, after his decease, upon trust for the lawful *children or child* if only one of A *in such manner as he* (the testator) *had thereinbefore willed and directed respecting his funded property*; and, if A should happen to die without *issue male or female* of his body lawfully begotten, then over: Sir L. Shadwell, V.-C., was of opinion that the words 'die without issue male or female' in the bequest

(*y*) *Dalzell* v. *Welch*, 2 Sim. 319, *ante*, p. 1907, n. (*g*); and see further on this point, *ante*.

(*z*) Amb. 681 [and stated from Reg. Lib. 3 De G. & J. 277]. See also *Wyth* v. *Blackman*, 1 Ves. sen. 196, *ante*, p. 1574; Amb. 555, *nom. Wythe* v. *Thurlston*.

(*a*) Much stress in the arguments at the bar was laid on the fact of there being no child; but the inadmissibility of such a principle of construction has been elsewhere shown, *ante*, p. 1632. [In *Re Pennefather*, [1896] 1 Ir. R. 249, a gift to "his children in priority, the sons to inherit before the daughters," was held to give the children estates tail in the realty.]

(*b*) 7 Sim. 352.

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over referred to *children*, the testator having clearly explained himself to mean children in the prior gift to the issue male and female.

"Issue" held to mean *children* by reference to another gift.

The other case referred to is *Peel* v. *Catlow* (*c*), where a testator bequeathed one-sixth part of his residuary estate amongst the *children* of his late sister, Jane T., to be paid at twenty-one, and, in case any such *child* or *children* should die under age leaving *issue* living at his, her, or their decease, their shares to be paid to the issue of such child or children respectively, with a bequest over of the shares of any child or children dying in minority without leaving issue, to the survivors and the issue of any who should have died leaving issue as aforesaid (such issue to take no greater share than their respective parents would have been entitled to, if living). And, as to one other sixth part, upon trust to pay the interest to the testator's sister, Mary C.; and, after her decease, to pay and apply the said share unto and amongst her *issue*, and to be payable at the like times, and with the like benefit of survivorship and accruer, *and in like manner as is thereinbefore expressed concerning the sixth part given to the children of his* (the testator's) *late sister, Jane T.*; and, in case the testator's sister Mary should die without leaving issue at her decease, or leaving any, they should die under twenty-one and should leave no issue living at his, her, or their decease, then over: Sir L. Shadwell, V.-C., was of opinion, that the bequest to the "issue" of the testator's sister Mary must of necessity be taken to mean *children*, by force of the terms of reference to the prior bequest to the children of Jane.

Remark on *Peel* v. *Catlow*.

"It may be observed, in support of the construction adopted by the Court, that the testator had used the word 'issue' in the sense of *children* in reference to both the share of the children of Jane and the share of Mary, namely, in the clauses which provided for the event of their respectively dying *under age* without issue living at their decease, where it is obvious the word '*issue*' necessarily meant *children*, as a minor could not leave issue of a remoter degree."

Limitation over if the devisee leave no issue at his death.

VII.—Gift over in case of Failure of Issue at the Death.—"It remains to be observed, that where a devise to a person and his issue (or to him and the heirs of his body (*d*)) is followed

(*c*) 9 Sim. 372.

(*d*) *Wright* v. *Pearson*, 1 Ed. 119, *ante*, p. 1845, but where it was not necessary to decide its effect upon the remainder. [Cf. *Abram* v. *Ward*, 6 Hare, 165. In *Richards* v. *Davies*, 13 C. B. (N.S.) pp. 69, 861, where a devise was to A for life, remainder to such of her children as she should by *will* appoint, and in default to her children and the heirs of their bodies in equal shares, "and in case of the death of A without leaving any child

by a limitation over in case of his dying without leaving issue *living at his death*, the only effect of these special words is to make the remainder contingent on the prescribed event. They are not considered as explanatory of the species of issue included in the prior devise (*e*), and, therefore, do not prevent the prior devisee taking an estate tail under it (*f*). The result simply is, that if the tenant in tail has no issue at his death, the devise over takes effect; if otherwise, the devise over is defeated, notwithstanding a *subsequent* failure of issue (*g*).

"In *Doe* d. *Gilman* v. *Elvey* (*h*) the circumstance of there being a limitation over on failure of issue at the death of the prior devisee does not appear to have given rise to an argument against an estate tail. The only doubt, it is conceived, could possibly be, whether it would have the effect of rendering the remainder expectant on the estate tail, contingent on the event of the devisee in tail leaving no issue *at his death* (*i*). The affirmative, however, seems to be the better opinion, as the Courts would hardly feel themselves authorised, without a context, to reject the clause 'living at his decease.' But words of an equivocal import would certainly not have the effect of subjecting the remainder to such a contingency" (*k*).

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living at her death, and in the event of such child or children surviving her and dying without leaving issue," to testator's right heirs; it was held that the express gift in tail to the children was not made contingent on their surviving A by the terms of the power (see *ante*, p. 630) and of the gift over.]

(*e*) See *Hutchinson* v. *Stephens*, 1 Kee. 240, *post*, p. 1927.

[(*f*) *Doe* v. *Rucastle*, 8 C. B. 876; *Marshall* v. *Grime*, 28 Bea. 375.] Indeed, in one instance, we have seen (*ante*, p. 1889) even an express devise to A and the issue living at his death was held to confer an estate tail; but this is a construction which probably would not be universally acquiesced in.

[(*g*) *Eden* v. *Wilson*, 4 H. L. C. pp. 257, 281, *ante*, p. 573.]

(*h*) 4 East, 313, *ante*, p. 1892

(*i*) * See an instance of such construction applied to personalty in *Lyon* v. *Mitchell*, 1 Madd. 467, where personal estate was bequeathed to A, B, C, and D, as tenants in common, and to the issue of their respective bodies; but in case of the death of any or either of them without issue living at the time of his or their respective deaths, then over to the survivors, and to the issue of their respective bodies. It was held that the bequest passed absolute interests to A, B, C, and D, subject to an executory bequest in case of their respectively dying without leaving issue at their decease.

* Bequest over on failure of issue at the death, following bequest to A and B and their issue.

(*k*) See *Broadhurst* v. *Morris*, 2 B. & Ad. 1, *ante*, p. 1866.

CHAPTER LII.

WORDS REFERRING TO FAILURE OF ISSUE.

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Old law: "die without issue."

I.—Construction of the Words "die without issue," and similar expressions.—Under the old law before the Wills Act, it was settled that words referring to the death of a person without issue, whether the terms were "if he die without issue," "if he have no issue," "if he die without having issue," "if he die before he has any issue" or "for want" or "in default of issue," unexplained by the context, and whether applied to real or personal estate, were construed to import a general indefinite failure of issue, that is, a failure or extinction of issue at any period (*a*).

The present law since 1 Vict. c. 26. Words importing a failure of issue to mean issue living at the death;

The old rule of construction is abrogated in regard to wills made or republished since the year 1837 by section 29 of the Wills Act, which provides "that in any devise or bequest of real or personal estate the words 'die without issue,' or 'die without leaving issue,' or 'have no issue,' or any other words which may import either a want or failure of issue of any person in his lifetime or at the time of his death, or an indefinite failure of his issue, shall be construed to mean a want or failure of issue in the lifetime or at the time of the death of such person, and not an indefinite failure of his issue (*b*), unless a contrary intention

(*a*) The statement of the old law is omitted in the present edition, but will be found in the 5th and earlier editions of this treatise. In addition to the cases referred to in the 5th edition, see *Gwynne* v. *Berry*, Ir. R. 9 C. L. 494 ("unmarried or if married without issue").

(*b*) See *Re O'Bierne*, 1 Jo. & Lat. 352, in which an attempt seems to have been made to argue that the very words "should he die without issue" indicated "the contrary intention." See also *per* Hall, V.-C., *Meredith* v. *Treffry*, 12 Ch. D., at p. 172.

shall appear by the will, by reason of such person having a prior estate tail, or of a preceding gift, being, without any implication arising from such words, a limitation of an estate tail to such person or issue, or otherwise; provided, that this Act shall not extend to cases where such words as aforesaid import if no issue described in a preceding gift shall be born, or if there shall be no issue who shall live to attain the age or otherwise answer the description required for obtaining a vested estate by a preceding gift to such issue."

—except in two cases.

The result, says Mr. Jarman (*c*), of section 29 "appears to be, that the words denoting a failure of issue refer to a failure at the death in every case, unless one of two points can be established. First, that the words are referential to the objects of a prior estate or a preceding gift; or, secondly, that they are so clearly and explicitly used to denote a failure of issue at any time as to exclude the statutory rule of construction, which, it will be observed, only obtains where there is an ambiguity, *i.e.*, where the words *may* import *either* a failure of issue [in the lifetime or] at the death, *or* an indefinite failure of issue. If, therefore, a testator by a will made or republished since 1837, devise real estate to A, or to A and his heirs, and if A shall die and his issue shall fail *at any time*, then to B, A will take an estate tail, as he formerly would have done without these special amplifying words, which exclude, beyond all question, the application of the enacted doctrine."

"Male issue."

It has been held that the section applies where the words are "without leaving any male issue" (*d*), or "shall not leave any child or children or issue of the same" (*e*), or where there is a gift over "in case of there being no heir" (*f*), or (in accordance with the spirit of this section) "die without leaving a male heir" (*g*), unless the devisee takes an estate tail under the prior gift (*h*).

(*c*) First ed., Vol. II, p. 455.

(*d*) *Re Edwards*, [1894] 3 Ch. 644, following *Upton* v. *Hardman*, Ir R. 9 Eq. 157. In *Green* v. *Giles*, 5 Ir. Ch. 25, the gift over was on death "without male issue lawfully begotten and arriving at the age of twenty-one years": it was held that these words were within section 29, but that the application of the section was excluded, because a contrary intention appeared. In *Re Thomas*, [1921] 1 Ch. 306, it was held that the section did not apply where the words were "die without issue who shall reach the age of twenty-one"; and in *Weldon* v. *Weldon*, [1911] 1 Ir. R. 177, it was held that "die without issue lawfully begotten" meant indefinite failure of issue because there was a prior estate tail.

(*e*) *Re Chinnery's Estate*, 1 L. R. Ir. 296; *Chunilal Parvatishankar* v. *Bai Samrath*, 30 T. L. R. 407 ("die without having had (leaving) any male issue").

(*f*) *Harris* v. *Davis*, 1 Coll. 416.

(*g*) *Re Leach*, [1912] 2 Ch. 422. See *Re Thomas*, [1920] 1 Ch. 515.

(*h*) *Ibid.*

Act does not apply to "dying without heirs of body."

The Act does not apply where the words are "die without heirs of the body," for there is no ambiguity in them (*i*).

Whether words "having a prior estate tail," etc., apply to personalty.

It has been doubted whether the exception depending on "such person having a prior estate tail," etc., applied to a gift of personalty, or was confined to a devise of real estate, in which alone, properly speaking, there could (before 1926) be an estate tail. "The legislature," said Lord Campbell (*k*), "may have loosely applied these words to *personalty*, or may have had reasons for intending a distinction between *realty*, in which there may be an estate tail, to be cut off by a disentailing deed, and *personalty* not attended by such incidents." *Harris* v. *Davis*, however, did not turn on that: and in *Green* v. *Green* (*l*), where freehold and leasehold property was given to A and the heirs of his body, and "in case of failure of issue," over; it was held by Sir J. K. Bruce, V.-C., that although strictly speaking there could not be a bequest of personalty in tail, yet, looking to the words of section 29, A was entitled to the leaseholds absolutely.

Act does not apply where "die without issue" would not previously have been taken indefinitely.

Again, the Act does not apply where the words importing a failure of issue would, under the old law, have been construed not to refer to an indefinite failure of issue. Thus, in *Morris* v. *Morris* (*m*), where by will made in 1839 the devise was to A, and if he should die without issue or before he should attain the age of twenty-one years, then over, it was contended that "or" was not to be read "and," and that consequently, though A had attained twenty-one, yet the gift over would take effect if he died without leaving issue at his death; but Sir J. Romilly, M.R., held that "or" must be read "and," as it would have been before the Act, and that A having attained twenty-one took an indefeasible estate in fee. He said that section 29 had no application where the words "die without issue" were coupled with other words which had been the subject of authority and decision, such as "dying under twenty-one," nor did it in such cases alter such a gift, so as to make it determinable upon A dying without issue living at death *or* under twenty-one (*n*).

(*i*) 1 Coll. 416. *Re Sallery*, 11 Ir. Ch. 236 ("die without heirs or issue"); *Dawson* v. *Small*, L. R. 9 Ch. 651 ("without heirs male of his body"). See *Re Conboy's Estate*, [1916] 1 Ir. R. 51 ("leaving no heir or issue").

(*k*) *Greenway* v. *Greenway*, 2 D. F. & J., at p. 137.

(*l*) 3 De G. & S. 480. See also *O'Neill* v. *Montgomery*, 12 Ir. Ch. R. 163; and *Weldon* v. *Weldon*, [1911] 1 Ir. R. 177 (chattels real).

(*m*) 17 Bea. 198.

(*n*) See cases on this subject, *ante*, p. 576.

So, in *Jarman* v. *Vye* (*o*), Sir W. P. Wood, V.-C., held that, inasmuch as it was decided before the Act by *Crowder* v. *Stone* (*p*) that a limitation over on the death of A without issue before some collateral event (as before the death of B) meant death and a failure of issue both happening in the life of B, such a limitation, not being susceptible of the alternative constructions mentioned in the Act, was not affected by it.

In *Dunn* v. *Morgan* (*q*), the will contained a provision that if the testatrix's son, to whom three farms had been devised subject to certain annuities, should die without issue prior to the demise of his mother or his sisters, the whole of the testator's estate should be divided as therein mentioned. Eve, J., held that "die without issue" meant "without issue him surviving."

II.—Where words "in default of issue," etc., are referable to the objects of a prior Devise or Bequest.—The question whether words importing a failure of issue refer to the objects of the preceding devise or bequest is, as has been pointed out, unaffected by section 29 of the Wills Act, so that the cases decided on wills subject to the old law are authorities with regard to wills subject to the Wills Act; the principles to be deduced from the authorities will now be considered.

In default of *such* issue.

(1) CONSTRUCTION IN REGARD TO PERSONALTY.—Where the words are "in default of such issue" it is clear that whatever be the class of issue included in the preceding gift whether children, sons, or daughters, and whatever the extent of interest given to those objects, the bequest over in default of such issue is construed to mean in default of such children, sons or daughters (*r*).

And if the prior gift is confined to children who survive their parent, a gift over in default of "such" issue, or (which is the same) of issue "becoming entitled," means in default of children who survive their parent (*s*).

(*o*) L. R. 2 Eq. 784. Mr. Theobald (8th ed., p. 793) observes that "It is not quite clear, whether a devise upon failure of issue to such of certain named legatees as should be 'then living,' which would in a will before the Act have been held to take effect upon failure of issue of the ancestor at his death, or at any time during the lives of the surviving legatees, would now be held to take effect only upon failure of issue of the ancestor at his death," and refers to *Murray* v. *Addenbrook*, 4 Russ. 407; *Greenwood* v. *Verdon*, 1 K. & J. 74, in both of which the will was before the Wills Act.

(*p*) 3 Russ. 217.

(*q*) 113 L. T. 444.

(*r*) *Maddox* v. *Staines*, 2 P. W. 421; 3 B. P. C. Toml. 108. *Stanley* v. *Leigh*, 2 P. W. 686, and see 3 Myl. & Cr., at p. 153.

(*s*) *Re Hopkins' Trusts*, 9 Ch. D. 131.

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"Without issue as aforesaid," held to refer to objects of prior contingent gift.

Prima facie the words "as aforesaid" would seem to have the same referential effect as the word "such," and in *Malcolm* v. *Taylor* (*t*) the words "without issue as aforesaid" were held to refer to the objects of a prior contingent gift, but the construction was considered to be aided by an expression in the context.

In default of issue preceded by a bequest to *children*.

But when the words are "in default of issue" simply, the question arises whether or not the word "issue" is to be construed as meaning the class of issue comprised in the preceding gift. Where the preceding gift has been a bequest to "children" it seems to be clear that words denoting a failure of issue refer to objects of that gift (*u*). Where the prior gift is expressly to "issue" though restricted by the context to issue of a particular class, or existing at a prescribed period, it seems more obvious to apply to the objects of such prior gift the words importing a failure of issue (the term being identical in both clauses) than where the prior gift is in favour of children (*x*). And on the whole the tendency of the authorities is to give a referential construction to words importing a failure of issue. The general doctrine is thus stated by Sir G. Turner, L.J., in *Pride* v. *Fooks* (*y*): "Amongst the cases on the point, which are almost innumerable, may be placed on the one side *Malcolm* v. *Taylor* and *Ellicombe* v. *Gompertz*, and on the other *Andree* v. *Ward* and *Campbell* v. *Harding*. If the primary limitation be in favour of children, and be so expressed that they take immediate vested interests, and there be a limitation over in default of issue, it is not difficult to see reasons for construing default of issue to mean default of children; for if there be no child there can be no other issue, and if there be a child the child will take the whole, and there will be nothing to limit over; but where the primary limitation is so expressed that there may be issue who may not take under it, as in the case of gifts to children

Statement of the general doctrine by Turner, L.J.

(*t*) 2 R. & My. 416. As to the meaning of the words "as aforesaid" see also *Walker* v. *Petchell*, 1 C. B. 652.

(*u*) *Doe* d. *Lyde* v. *Lyde*, 1 T. R. 593; *Salkeld* v. *Vernon*, 1 Ed. 64 (children living at testator's death); *Att.-Gen.* v. *Bayley*, 2 B. C. C. 553 ("if he shall happen to die without issue"); *Vandergucht* v. *Blake*, 2 Ves. Jun. 534 ("death without issue"); *Farthing* v. *Allen*, 2 Mad. 310 (the marginal note omits the word leaving); *Robinson* v. *Hunt*, 4 Bea. 450 (without lawful issue); *Cormack* v. *Copous*, 17 Bea. 397 (in default of issue); *Re Wyndham's Trusts*, L. R. 1 Eq. 290 (die without issue); *Re Sanders' Trusts*, *ib.* 675 (die unmarried and without issue); *per* Parker, V.-C., *Bryan* v. *Mansion*, 5 De G. & S. 737; *Smyth* v. *Power*, Ir. R. 10 Eq. 192. But see also *per* Lord Cottenham, *post*, and *per* Turner, L.J., *post*, and 4 D. M. & G., at p. 88.

(*x*) *Leeming* v. *Sherratt*, 2 Hare, 14, following *Target* v. *Gaunt*, 1 P. W. 432, and *Hockley* v. *Mawbey*, 1 Ves. Jun. 143. See also *Hanan* v. *Drew*, 10 Ir. Eq. 333.

(*y*) 3 De G. & J. 252.

to vest at twenty-one, it is not so easy to see the reasons on which this construction has prevailed. It is true that by adopting the construction the limitations are made to follow in regular order and succession, but it is equally true that the general terms in which the limitation over is expressed, prove that there has been some omission or some mistake on the part of the testator, and the difficulty seems to be to determine what the omission or mistake has been, whether it has been in the gift over not having been limited, or in the primary gift not having been extended."

Statement of general doctrine by Lord Cottenham.

And the earlier statement of the doctrine by Lord Cottenham in *Ellicombe* v. *Gompertz* (*z*) is to a similar effect: "Provision is made for certain members of a class answering a particular description, and then a gift over is made on failure of the class. If it be clear that the whole of the class were not to take, the gift over, though made to depend on the failure of the whole class, will be construed to take place upon the failure of that description of the class who were to take; and, on the other hand, if it appear that all the class were intended to take, although some only are enumerated, and the gift over be upon the failure of the whole class, the Court will adopt such a construction as will extend the benefit in the best way the law will admit to the whole class."

The two cases of *Andree* v. *Ward* and *Campbell* v. *Harding* referred to by Sir G. Turner, in which the referential construction was not adopted, are, as will be seen, rather exceptional and must not be considered to intrench on the general principle of construction above stated; and if they do conflict with that principle it may be doubted whether they would be followed.

Words held in an executory trust not to refer to prior objects.

In *Andree* v. *Ward* (*a*), a sum of £5,000 stock was bequeathed to A for life, and in case he should marry any woman with £1,000 fortune, then the testator's will was that the £5,000 should be settled on his wife and the issue of such marriage; but in case A died leaving no issue of his body lawfully begotten, then over: Sir T. Plumer, M.R., was of opinion that "issue"

(*z*) 3 Myl. & Cr. 127 ("from and immediately after the decease of all the sons and grandsons of my said son J. J."); *Trickey* v. *Trickey*, 3 My. & K. 560, is another example of the referential construction, but in it, as in *Ellicombe* v. *Gompertz*, the gift over was not limited in default of issue, but in default of a class of issue. The general statement of principle in *Ellicombe* v. *Gompertz* is quoted and followed in *Hutchinson* v. *Tottenham*, [1898] 1 Ir. R. 403; [1899] 1 Ir. R. 344 (marriage settlement). *Ellicombe* v. *Gompertz* was cited as a leading authority by Sir J. Wigram, in *Leeming* v. *Sherratt*, 2 Hare, at p. 14, see also *Hillersdon* v. *Lowe*, 2 Hare, 355; *Cardigan* v. *Curzon-Howe*, L. R. 9 Eq. 358 (settlement of family plate). The referential construction could not be adopted in *Re Johnson*, 111 L. T. 130.

(*a*) 1 Russ. 260. In *Allanson* v. *Clitherow*, 1 Ves. Sen. 24 (an executory trust of realty), the gift over on death without issue was held also non-referential in like circumstances.

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in the ulterior gift could not be confined to issue of such marriage as before mentioned, and that therefore A having left issue not of such a marriage, the gift over failed.

Referential construction rejected.

In *Campbell* v. *Harding* (*b*), a testator bequeathed to his adopted daughter, Caroline H., £20,000 Consols, and his house and landed property at Culworth; but in case of her death without lawful issue, then the testator willed the money so left to her to be equally divided betwixt his nephews and nieces who might be living at the time, and the land, etc., at Culworth to his nephew J. H.; and the testator requested his friends C. and S. to be guardians for Caroline H., and if she married it must be with their consent, and "the property to be solely settled upon herself and her children, and in no way charged or alienated." It was contended that the words "death without lawful issue" in this case meant death without having had any such issue as would have taken under the settlement subsequently directed by the testator, and not death without issue indefinitely; but it was held by Sir L. Shadwell, V.-C., and afterwards by Lord Brougham, and ultimately in the House of Lords (where the case was very elaborately argued), that the words could not be restricted, and consequently that Caroline H. (who had died unmarried) became absolutely entitled to the stock. Lord Brougham considered that the introduction of the direction to settle the stock on the marriage of the legatee did not vary or affect the construction which was to obtain in the alternative event of her not marrying at all (*c*).

Pride v. *Fooks.*

Pride v. *Fooks* (*d*) is another instance in which the referential construction was rejected; there the bequest was in trust for such child or children as the testator's niece and two nephews should leave at the time of their respective deceases, one-third to the child or children of each (but not giving life interests to the parents), and in case the niece or either of the nephews should happen to die without leaving any children or child lawfully begotten, her or his third part to be paid to the children or child of the other or others leaving children or a child, in

(*b*) 2 R. & My. 390 (*Candy* v. *Campbell*); 8 Bli. (N.S.) 469; 2 Cl. & Fin. 421.

(*c*) This case was cited as a leading authority by K. Bruce, V.-C., in *Pye* v. *Linwood*, 6 Jur. 618; and by Bacon, V.-C., in *Fisher* v. *Webster*, L. R. 14 Eq. 283. But in the former case it was unnecessary in the events which had happened to decide whether the words importing a failure of issue applied to the objects of the preceding bequest to "children" or extended to issue indefinitely; the case therefore has really no connection with the present subject of discussion. The material question was, whether the words referred to issue living at the death, which construction the Court (it is considered most properly) negatived. In *Fisher* v. *Webster*, the prior bequest being to A and her children jointly, the simply referential construction of the gift over if A should die without issue was of course inapplicable.

(*d*) 4 Jur. (N.S.) 678; 3 De G. & J. 252.

equal proportions if more than one, and in case all of them the nephews and niece should happen to die *without leaving* (*e*) *any issue* lawfully begotten, in trust for the children of X then living and the issue of his children then dead, equally *per stirpes*. Neither of the nephews left any child at his death, nor did the niece, but the niece left grandchildren. It was held by Sir J. Romilly, M.R., that "issue" in the gift over was not to be restricted to "children," and that there was an intestacy. On appeal, the decision was affirmed by K. Bruce and Turner, L.JJ., upon the construction of the particular will, "children" being strongly contrasted with "issue," and there being, not a series of limitations to take effect in succession, but only two sets of concurrent contingent limitations. Sir G. Turner said he would not give any opinion upon *Westwood* v. *Southey* (*f*), upon which Sir J. Romilly had much relied.

Suggested distinction where the gift over is on death without issue living at the death.

In *Westwood* v. *Southey* (*f*), a very material distinction was drawn by Sir R. Kindersley regarding those cases where, by express direction, or by the true construction, of the will, the death of the first taker without issue means without issue living at his death (*g*). He said: "It is true, that where there is a legacy to one for life, and after his death to his children, with a gift over if he die without issue, and there is nothing to restrain those words, the words 'without issue' are limited to the issue before mentioned. But the ground on which the Court has used violence with the words and interpolated the word 'such' is this, that if there were no restriction on the generality of the words 'dying without issue,' the limitation over would be void. . . . But when the dying without issue is either in terms, or by the proper construction, limited to dying without issue living at the death, there is no reason for interpreting the words as meaning 'such issue as before mentioned.' I am not aware of any case in which a legacy to one for his life, with remainder to his children, and a gift over if he dies without issue in the sense of issue living at his death, the limitation has been restricted as if the words had been such issue as before mentioned. Such a construction might in fact wholly defeat the testator's intention; for if the words were construed to mean 'such issue' the effect might be this: the tenant for life might have an only child, who might attain twenty-one, marry, and have children, and die before the tenant for life, and then the child and the issue of that child

(*e*) This as to personalty meant leaving at their deaths.

(*f*) 2 Sim. (N.S.), at p. 202. See also *Walker* v. *Mower*, 16 Bea. 365. *Re Edwards*, [1906] 1 Ch. 570, approved *Walker* v. *Mower* and disapproved the observations of Malins, V.-C., in *Kidman* v. *Kidman*, 40 L. J. Ch. 359.

(*g*) The V.-C. repeated this statement of the rule in *Madden* v. *Ikin*, 2 Dr. & Sm., at p. 213. So Parker, V.-C., *Bryan* v. *Mansion*, 5 De G. & S. 737.

would be excluded." In the case before him the V.-C. acted upon the distinction, although the effect was to divest a previously vested gift to the children.

Re Merceron's Trusts.

But of course, although the primary gift is so expressed that there may be issue who may not take under it, the context may show that the omission or mistake is not in that gift, but in the gift over. This was considered to be the case in *Re Merceron's Trusts* (*h*), where a testator gave a legacy to each of his two daughters for life, and after her death unto and equally among all and every such child and children she might happen to leave at her decease; and in case she should die without issue, then to such persons and in such manner as she should by will appoint. The will then contained a gift of residue to the testator's son. The daughter died leaving grandchildren but no child living at her death. It was held by Sir R. Malins, V.-C., that "die without issue" meant such issue as was before mentioned, namely, children living at the daughter's decease; and, there being none, that the power to appoint had arisen. The V.-C. thought it perfectly clear that, as the children of the daughters who were the primary objects of the disposition could not take, the next object of the testator's bounty was the daughter herself, who, if she had no children or only children who could not take, was to have the absolute dominion over the fund.

"Default of such issue."

(2) CONSTRUCTION IN REGARD TO REAL ESTATE.—(i) *Where the Expression is "such issue."*—With regard to real estate also (bearing in mind that, where the referential construction is adopted, the rules laid down in the earlier decisions still apply), it is clear, as Mr. Jarman points out (*i*), "that the words 'in default of *such* issue,' following an express devise to any particular branch of issue, as *children, sons, or daughters*, will be construed to refer to the issue before described; that is, as meaning in default of '*such*' *children, sons*, &c. (*k*). And in cases of *this* class (as distinguished from those which form the subject of the next section), this rule prevails, whether the objects of such preceding devise take estates of inheritance, or *only* estates *for life* (*l*)."

(*h*) 4 Ch. D. 182 (will dated 1838, but the Wills Act was not referred to). It is clear that where words importing failure of issue refer to the objects of the preceding gift, the construction is not affected by the change in the law.

(*i*) First ed., Vol. II, p. 368.

(*k*) *Letheullier* v. *Tracey*, Amb. pp. 204, 220; *Denne* d. *Briddon* v. *Page*, 11 East, 603, n.; 3 T. R. 87, n.; *Hay* v. *Lord Coventry*, 3 T. R. 83; *Doe* d. *Comberbach* v. *Perryn*, *ib.* 484; *Goodtitle* d. *Sweet* v. *Herring*, 1 East, 264.

(*l*) As to the nature of the remainder created by a limitation over in default of issue, see *post*, p. 1925.

General principle "in default of *such* issue" is referential.

Mr. Jarman thus states the result of the authorities at the time when he wrote (*m*): "The proposition seems undeniable, that the phrase 'in default of such issue,' 'for want of such issue,' or 'on failure of such issue,' following a devise to any class of issue, or even to any individual child or other descendant, is simply and exclusively referential, and does not enlarge, or in any manner affect any of the prior estates." The cases are numerous—the construction has been adopted after a devise to children in fee (*n*); to children for life (*o*); to sons for life (*p*); to daughters for life (*q*); to sons in tail male (*r*); and to a son in tail male (*s*).

Effect where prior devise is in favour of a single child.

Even where the prior devise embraces a single child only, the words "for want of such issue" are construed for want of such child, and have not the effect of conferring an estate tail on the parent of that child (*t*).

Of course where the word "issue," occurring in an express devise to issue, is therein explained to mean *children*, the words in default, or for want of such issue, immediately following, are construed in default of such children (*u*).

"Such heirs" preceded by gift to sons and daughters in fee.

So where there was a devise to one for life, remainder to her sons and daughters in fee, but should she die without having such heirs, over, the words "such heirs" were held to refer to the sons and daughters (*x*).

There have been cases (*y*) which appear to conflict with the general principle above stated, but unless they can be referred to special circumstances they must be considered as overruled by the authorities quoted above.

(*m*) First ed., Vol. II, p. 372.

(*n*) *Doe* d. *Comberbach* v. *Perryn*, 3 T. R. 484; *R.* v. *Marquis of Stafford*, 7 East, 521; *Foster* v. *Hayes*, 2 Ell. & Bl. 27; 4 Ell. & Bl. 717; *Walker* v. *Petchell*, 1 C. B. 652 (die without leaving lawful issue as aforesaid).

(*o*) *Doe* d. *Tooley* v. *Gunniss*, 4 Taunt. 313 (on failure of such issue); *Doe* d. *Liversage* v. *Vaughan*, 1 D. & Ry. 52; 5 B. & Ald. 464 (on failure of such issue); *Ashley* v. *Ashley*, 6 Sim. 358 (want of such issue).

(*p*) *Foster* v. *Lord Romney*, 11 East, 594. See also *Goodright* d. *Lloyd* v. *Jones*, 4 M. & Sel. 88; *Purcell* v. *Purcell*, 2 D. & War., at p. 219, n.; *Bridger* v. *Ramsey*, 10 Hare, 320; *Bevan* v. *White*, 7 Ir. Eq. Rep. 473; *Re Arnold's Estate*, 33 Bea. 163; *Re Pollard's Estate*, 3 D. J. & S. 541.

(*q*) *Den* d. *Briddon* v. *Page*, 3 T. R. 87, n. (in default of such issue); *Hay* v. *Earl of Coventry*, 3 T. R. 83.

(*r*) *Doe* d. *Phipps* v. *Lord Mulgrave*, 5 T. R. 320 (failure of such issue).

(*s*) *Robinson* v. *Robinson*, 1 Burr. 38; 3 B. P. C. Toml. 180; note that the word son was used as a word of limitation; see Lord Kenyon's judgment in *Doe* v. *Mulgrave*, 5 T. R., at p. 323.

(*t*) *Doe* v. *Charlton*, 1 M. & Gr. 429, *ante*, Chap. L. *Boydell* v. *Golightly*, 14 Sim. 327; *Ashburner* v. *Wilson*, 17 Sim. 204.

(*u*) *Ryan* v. *Cowley*, 1 Ll. & G. *t. Sugd.* 7.

(*x*) *Polley* v. *Polley*, 29 Bea. 134.

(*y*) *Lomax* v. *Holmden*, 1 Ves. Sen. 290; *Evans* d. *Brooke* v. *Astley*, 3 Burr. 1570; *Doe* d. *Harris* v. *Taylor*, 10 Q. B. 718 ("for default of such first issue," held to mean for default of issue of such first son). Sir J. Romilly, M.R., declined to follow this in *Re Arnold's Estate*, 33 Bea. 163. See also Chap. XVIII, p. 561, n. (*x*).

CHAPTER LII.

"Such issue" preceded by a devise to first and other sons *and their heirs.*

There is, however, an apparent exception to the general principle where (before 1926) successive interests are given or implied in such a way that it is necessary to give estates tail to effectuate the intention and to reject the referential force of the words "such issue."

Thus, in *Lewis* d. *Ormond* v. *Waters* (*z*), where the devise was to the testator's eldest son for life, remainder to a trustee to preserve contingent remainders, remainder to the first and other sons of the testator's eldest son and their heirs, and for want of such issue, to his second son B for life, with similar remainders; it was held that the word "issue" in the limitation over referred to the heirs of the sons, and consequently that they took successive estates tail, which would effectuate the apparent intention of the testator to continue the estates in his family.

Remark on *Lewis* v. *Waters.*

"This," as Mr. Jarman remarks (*a*), "is a strong case, inasmuch as there was an antecedent class of issue to which the clause might have been applied; but as the words 'first and other' evidently imported that the sons were to take *successively* (*b*), there was no mode of giving effect to the intention except to cut down the fee-simple of the sons to an estate tail."

Remarks on doctrine advanced in *Ginger* v. *White.*

In *Ginger* d. *White* v. *White* (*c*) the devise was to children successively, one after another, as they should be in priority of age, and to their heirs: Willes, C.J., read this as conferring an estate tail only (*d*), though he distinctly held, as Mr. Jarman points out (*e*), "that the subsequent words importing a failure of issue referred to the children themselves (*f*). The learned Judge seems even to have thought that a gift over in default of *male* children to *female* children, and in default of female children to a person who was their cousin, explained heirs to mean heirs *of the body*, 'because the male children could not die without heirs if any of their sisters were living, and the female children could not die without heirs if the cousin were living' (*g*): but he evidently confounded *a remainder* with an *alternative limitation*, in other words, he failed to distinguish between a devise over if the children should die without heirs, and a devise over if there should be *no* children. With the latter the doctrine to which he refers has no connection."

(*z*) 6 East, 336.

(*a*) First ed., Vol. II, p. 371.

(*b*) See *Kershaw* v. *Kershaw*, 3 Ell. & Bl. 845; *Honywood* v. *Honywood*, 89 L. T. 378 (settlement); *Cradock* v. *Cradock*, 4 Jur. (N.S.) 626; *Re Harcourt*, [1920] 1 Ch. 492, and *Ginger* v. *White*, Willes, 348, *infra*, n. (*n*). *Biddulph* v. *Lees*, E. B. & E. 289, stated *ante*, p. 1807.

(*c*) Willes, 348.

(*d*) See also *Hennessey* v. *Bray*, 33 Bea. 96.

(*e*) First ed., Vol. II, p. 371; the case is referred to *post*, p. 1930.

(*f*) See *post*, note (*n*).

(*g*) See as to this doctrine, *ante*, p. 1808.

CHAPTER LII.

Referential construction excluded by context.

In *Chorlton* v. *Craven*, already stated (*h*), it was impossible to read the gift over "for want of such lawful issue of the name of C. either by Thomas or James" as simply referring to the sons who were objects of the preceding devise, for the sons of James were not the objects of that devise. The intention, it was said, plainly was that the estate should not go over to the daughters until all the issue male of Thomas had been provided for; to effectuate which it was considered an estate tail might be implied in Thomas in remainder after the estate tail male previously limited to his sons (*i*). Sufficient operation it was thought was given to the word "such" by referring it to the word "male" in the previous devise,—the intention that Thomas' entail should descend in the male line, being also manifested by the express desire to preserve the name of C. This construction by parity of reasoning enabled them to give the same estate tail in remainder to James (*k*), and the ultimate remainder to the daughters followed as a vested remainder, and completed the scheme of the will.

In default of issue generally (without the word "such").

(ii) *Where the Reference is to "issue" simply.*—"It is well settled also," says Mr. Jarman (*l*), "that words importing a failure of issue (without the word *such*), following a devise to *children* in fee simple or fee tail, refer to the objects of that prior devise, and not to issue at large."

This construction has been adopted after a devise to children in fee simple (*m*), children in tail (*n*), sons in tail male (*o*), sons successively in tail male followed by daughters in common in

(*h*) *Ante*, p. 1883, and (same devise) *Parker* v. *Tootal*, 11 H. L. C. 143.

(*i*) This construction was thought to have the greater weight as it accounted for the antecedent decisions of K. B. and of Lord Eldon; but, as already stated, no final opinion was expressed upon it, *ante*, p. 1883.

(*k*) As to this see *ante*, p. 633.

(*l*) First ed., Vol. II, p. 372. This statement is quoted with approval by Lord Selborne, C., in *Bowen* v. *Lewis*, 9 A. C., at p. 900.

(*m*) *Goodright* d. *Docking* v. *Dunham*, Doug. 264 ("in case his son died without issue"); *Malcolm* v. *Taylor*, 2 R. & My. 416 ("in case M. T. should die without issue of her body lawfully begotten"); *Goymour* v. *Pigge*, 7 Bea. 475; *Doe* d. *Todd* v. *Duesbury*, 8 M. & W. 514. See also *Doe* v. *Selby*, 2 B. & Cr. 926, *ante*, p. 1424. *Tarbuck* v. *Tarbuck*, stated above; *Hale* v. *Pew*, 25 Bea. 335; *Maden* v. *Taylor*, 45 L. J. Ch. pp. 569, 572.

(*n*) *Ginger* d. *White* v. *White*, Willes, 348 ("in case I should die without issue"). The previous gifts were to male children successively and to their heirs; then to female children and their heirs. The children were considered to take estates tail, see above, p. 1924.

(*o*) *Baker* v. *Tucker*, 3 H. L. C. 106 (in default of issue), following *Blackborn* v. *Edgley*, 1 P. W. 600. This case was alleged arg. to be misreported, and extracts from R. L. were cited to show that the gift over there was one from which in no case could an estate tail have been implied. But Lord Brougham observed that if the case had always been supposed to be of one purport, and as such had ruled subsequent cases, it would not do to go back to some critical difference; because the law might have been settled. *Grattan* v. *Langdale*, 11 L. R. Ir. 473 (in default of issue, male or female of F.); see also *Watkins* v. *Frederick*, 11 H. L. C. 358, at p. 370.

tail (*p*), and sons successively in tail (*q*). Words devising over the property on a failure of issue male following a devise to the whole line of sons successively in tail male, are also referential to those objects (*r*).

Die without *leaving* issue.

In *Tarbuck* v. *Tarbuck* (*s*), where there was a devise to children in fee with a devise over on death without leaving lawful issue, Lord Cottenham appears to have been of the opinion that these words meant "in the event of there being no children at the time of the death of the tenant for life, whose estate preceded the gift to the children," but it seems clear from *Doe* d. *Todd* v. *Duesbury* (*t*), that the expression "die without leaving issue" means failure of previous estates in fee to issue, and Rolfe, B., in delivering the judgment of the Court in that case said, "Whenever the words 'die without leaving issue' have been construed to mean 'die without leaving issue living at the death,' the Courts have always relied or professed to rely on some other expressions or circumstances apparent on the face of the will, and have never assumed to act against that which we consider to be a long-established settled rule of construction, namely, that in wills of real estates these words refer to a general failure of issue at any time, however remote."

Death without leaving *children.*

It is now well settled that if you have a gift by will to A for life, and after A's death to his children, in terms which would give them an absolute interest in A's lifetime, and then you have a gift over simply in these terms, "if A dies without leaving children," you are to construe the expression "leaving" so as not to destroy any prior vested interest. In other words, you construe it as meaning "without having a child who has attained a vested interest" (*u*).

Where the preceding devise has been to children and the gift over is on death "without leaving issue," it will be observed that the construction which takes "issue" to refer to children exposes the vested interest of a child to be divested on decease within a given period, although leaving issue who

(*p*) *Morse* v. *Marquis of Ormonde*, 5 Mad. 99; 1 Russ. 382 ("in default of all such issue").

(*q*) *Peyton* v. *Lambert*, 8 Ir. Com. Law Rep. 485.

(*r*) *Bamfield* v. *Popham* 1 P. W. pp. 54, 760; 1 Eq. Ca. Ab. 183; 2 Vern. pp. 427, 449.

(*s*) 4 L. J. Ch. (N.S.) 129; for a full statement and discussion of this case see the fifth and earlier editions of this work.

(*t*) 8 M. & Wels. 514.

(*u*) *Per* Romer, L.J., in *Re Cobbold*, [1903] 2 Ch., at p. 304, corrected in [1915] 1 Ch. 847. It makes no difference that the testator knew of the existence of a child, and that his knowledge appears on the face of the will. See also *White* v. *Hill*, 4 Eq. 265; *Treharne* v. *Layton*, L. R. 10 Q. B. 459, and other cases cited *ante*, p. 1700, and also *Re Roberts*, [1903] 2 Ch., at p. 204. Compare *Re Bradbury*, 90 L. T. 824.

survive that period. There are, therefore, strong grounds in such a case for not adopting the referential construction.

Hutchinson v. *Stephens*

In *Hutchinson* v. *Stephens* (*x*), the devise was to trustees in fee upon trust for H. for his life, and after his decease upon trust for the child and children of H. lawfully to be begotten, at his, her or their respective ages of twenty-one years, if more than one as tenants in common; and if there should be but one child living at his decease then in trust for such only child at twenty-one: but in case H. should die without leaving any issue of his body living at the time of his decease, then over. H. had two children, both of whom died in his lifetime, one of them leaving children who survived H. Lord Langdale, M.R., held that, in the event which had happened, the children took estates in fee simple as tenants in common. In this case the words, "if there shall be but one child living at his decease," appeared to supply a plausible argument for reading the word "issue," subsequently occurring in juxtaposition with the same words, in the sense of children, and its rejection serves to show the strong disinclination of the Courts to adopt a construction which exposes the vested interest of a child to be divested.

Remark on *Hutchinson* v. *Stephens*.

So, in *Ex parte Hooper* (*y*), where the devise was to A for life, and after her decease to her children, "(in case she shall leave more than one child) their heirs and assigns as tenants in common, but in case she shall *have* only one child then to such one child in fee"; but in case A should "die without leaving any issue," then to such children as the testator should leave or have living at the time of the death of A. Sir R. Kindersley, V.-C., decided first, that under the original devise the property vested in the children on their birth; secondly, that the testator plainly meant failure of issue at the death of A; and thirdly, that, as there was a grandchild then living, the limitation over failed (*z*).

"Die without leaving issue" held not to refer to issue before mentioned.

But if the original devise is to such children as survive their parent, the construction which reads the words "die without leaving issue" as denoting a failure at that time of issue of

(*x*) 1 Keen, 240.

(*y*) 1 Drew. 264; 21 L. J. Ch. 402.

(*z*) The first was the principal point. The V.-C. held "leave" in the parenthesis to mean "have," assisted thereto by finding "have" used in a corresponding portion of a similar devise to a brother of A and his children. He is sometimes cited (L. R. 4 Eq. pp. 269, 270; 7 Eq. p. 476; 10 Q. B. p. 462) as having construed "leaving" in the gift over as "having"; but, notwithstanding the marginal note in 1 Drew., his opinion on that clause was distinctly contrary (1 Drew. p. 268), and therein agrees with his opinion, 2 Sim. (N.S.) pp. 202, 203, stated *ante*, p. 1921. See also *Re Ball*, 36 Ch. D. pp. 508, 511; 40 Ch. D. 11.

every degree might defeat the gift over without benefiting any previous devisee. The simply referential construction, though it would not, any more than that just mentioned, provide for surviving issue of remoter degree than children, would save the gift over. Thus, in *Eastwood* v. *Avison* (*a*), where the primary gift (implied from a power of testamentary appointment) was to children living at the death of their father, the donee, with a gift over on his death "without issue," it was held that this meant without children objects of the previous gift, *viz.*, children living at the death of their father. But for the power it seems that the father might have been held entitled to an estate tail by implication from the words "die without issue," such estate tail to take effect in the alternative of there being no children at his death. An implication of this kind (as has been seen) is frequently made to supply a gap caused by the exclusiveness of the primary gift.

Effect where words refer to failure of issue of children, objects of prior devise.

"It seems," says Mr. Jarman (*b*), "that where the testator not merely devises over the property in the event of the parent dying without issue, but goes on to provide for the contingency of the *issue* also dying without issue, the effect is to cut down the fee simple of the children to an estate tail (*c*); although, it will be observed, by this construction two different meanings are given to the word 'issue' in the same sentence (*d*). In the case of *Ives* v. *Legge* (*e*) this construction was given to the phrase 'in default thereof,' following a devise to the parent for life, with remainder to the children in fee. It was held to refer to both the children and the heirs of the children; and, as the devisee over stood in the relation of uncle to the children (so that there could not be a failure of their heirs while he lived), the word 'heirs' was read heirs *of the body*" (*f*).

"In default thereof."

(*a*) L. R. 4 Ex. 141. But see *Doe* v. *Hopkinson*, *post*, p. 1929.

(*b*) First ed., Vol. II, p. 379.

Doe v. *Reason*.

(*c*) "*Doe* d. *Barnard* v. *Reason*, cit. 3 Wils., at p. 244; but as the words were 'in default of such issue,' the case hardly seems to fall within the present section. The devise was to E. for life, and after her decease to such issue of the body of E. as should be then living, and to the heirs of such issue; and if there should be only such issue one child, then the whole to that one child and its heirs; and if two or more children, then to such two or more and their heirs, as tenants in common: and in case E. should die without issue then living, *or in case all such issue should die without issue*, so that the descendants of her body should be dead without issue, then to B. and F. in fee. It was held, that E. took an estate for life only, with remainder to her issue (*qu.* children) in tail, with a vested remainder to B. and F. See also *Southby* v. *Stonehouse*, 2 Ves. Sen. 611; *Smith* v. *Horlock*, 7 Taunt. 129." (Note by Mr. Jarman.)

(*d*) "But the force of this objection is somewhat weakened by the fact that the word 'issue' in this position must be used, in the first instance, in a restricted sense, since the failure of such first-mentioned issue is treated as an event distinct from the failure of the issue subsequently mentioned, which of course would be involved therein if the word 'issue' denoted issue indefinitely." (Note by Mr. Jarman.)

(*e*) 3 T. R. 488, n.

(*f*) *Ante*, pp. 1806 *seq.*

When words importing failure of issue raise an estate by implication.

(iii) *Where the Prior Gift is to a contingent Class of Issue.*—It may be observed, that whatever tends to narrow the range of objects comprised in the express devise to issue of a certain class or denomination, tends in the same degree to weaken the ground for construing subsequent words importing a failure of issue to refer exclusively to those objects. Thus, the circumstance of the prior gift to children being restricted to such as should attain a particular age was considered to exert this kind of influence upon the construction in *Doe* d. *Rew* v. *Lucraft* (*g*), where the words " depart their life without leaving issue " were held not to be referable to the issue before mentioned, a son or daughter who should attain twenty-one, and in *Doe* d. *Bills* v. *Hopkinson* (*h*) the words " die without lawful issue " were held not referable to the prior devisees—children who should survive the tenant for life.

In *Doe* v. *Lucraft* the Court did not refuse to construe " issue " (in the gift over) as " children," but only to construe it as " children of the restricted class before mentioned " (*i*). In *Doe* v. *Hopkinson* the Court did both. But in *Sanders* v. *Ashford* (*k*), where a testator devised lands to A for life, remainder to his first son who should attain twenty-one in fee, and in case A should have no son to attain that age, then to the daughters of A as tenants in common in fee; but " in the event of A dying without having any issue male who should attain the age aforesaid, or any issue female, then over "; it was held by Romilly, M.R., that the gift over on failure of issue meant on failure of such issue male and female as mentioned in the prior devise; for the repetition of the restrictive words showed that this was the issue he had present to his mind.

" Die without issue to attain twenty-one," referred to prior gift to " first son who should attain twenty-one."

Mr. Jarman also refers (*l*) to " the case of *Franks* v. *Price* (*m*), where there being in a will (among numerous limitations) a devise *in certain contingent events* of the respective moieties to A and B for life, with remainder to their respective first and other sons in tail male, which were followed by a devise over, *in case A and B should both die without leaving issue male, or such issue male should die without leaving issue male*; it was held, after much argument, that, as the preceding devises did not carry the property to the issue male of A and B in every possible event, the words introducing the

" Die without leaving issue male " not confined to sons being prior contingent devisees.

(*g*) 8 Bing. 386. See also *Alexander* v. *Alexander*, 16 C. B. 59.
(*h*) 5 Q. B. 223.
(*i*) See *per* Parker, V.-C., *Bryan* v. *Mansion*, 5 De G. & S., at p. 742.
(*k*) 28 Bea. 609.
(*l*) First ed., Vol. II, p. 381.
(*m*) 6 Scott, 710; 3 Bea. 182.

devise over had the effect of creating an implied estate tail in remainder expectant on the estates conferred by those devises (*n*).

Principle on which preceding are reconcileable with cases where the referential construction was not adopted.

"By keeping steadily in view the principle above suggested, namely, that the argument in favour of applying to the objects of a prior express devise words denoting a failure of issue, gains or loses force in proportion as such prior devise is more or less comprehensive in its range of objects, we shall be able to reconcile the preceding cases, (in which a clause of this nature, following a devise to the whole line of children or sons, has been held to refer to the objects of such prior devise,) with those that remain to be stated, in which similar words, preceded by a devise to one or more son or sons only, have been decided not to be simply referential, but to import, [under the law, before the Wills Act,] a general failure of issue, and, therefore, to confer an estate tail on the parent; such implied estate tail being (as we shall presently see) either an estate in possession or in remainder, expectant on the determination of the estates comprised in the prior express devise" (*o*).

Result of decisions under old law.

The result of the decisions on the questions referred to by Mr. Jarman, under the law before the Wills Act, was thus stated in the third edition of this work (*p*):

Conclusions suggested.

"1st. That the words, *in default of issue*, or expressions of a similar import, following a devise to *children in fee-simple*, mean in default of *children* [and following a devise to children in tail, mean in default of children or of issue inheritable under the entail (*q*)]. This is free from all doubt.

(*n*) "It is observable that, A having died without issue male, B was held to be tenant in tail *of the entirety*; so that it should seem that the M.R. (Lord Langdale) considered that the words (in the text distinguished by italics) had the effect of giving to A and B either successive estates tail male by implication in the entirety (as in *Tenny* v. *Agar*, [12 East, 252, and *Romilly* v. *James*, (6 Taunt. 263]), or, (as seems more probable,) estates tail male in the respective moieties, with *cross remainders in tail male*. His Lordship did not advert to this point, (which is one of considerable nicety,) conceiving, probably, that B was entitled in either case." (Note by Mr. Jarman.)

(*o*) Here followed, in the first edition, a statement and discussion of the cases cited in the following notes (other than those enclosed in brackets, which were added by previous editors). For this statement and discussion the reader is referred to the fourth edition of this work, Vol. II, pp. 471 *et seq.*

(*p*) By Messrs. Wolstenholme and Vincent, Vol. II, pp. 457 *seq.* Their alterations and additions are indicated by brackets, both in the text and in the notes: the rest is by Mr. Jarman, who added to his summary a recommendation to the reader "before he unreservedly accedes to the above propositions, to consult the cases themselves, in order that he may see how far the construction may have been aided by the circumstances of the particular case."

(*q*) *Goodright* v. *Dunham*, Doug. 264, *ante*, p. 1925; [*Doe* v. *Duesbury*, 8 M. & Wels. 514, *ante*, p. 1926;] *Ginger* d. *White* v. *White*, Willes, 348, *ante*, p. 1924; [*Baker* v. *Tucker*, 3 H. L. C. 106; 14 Jur. 771, *ante*, p. 1925].

"2nd. That these words following a devise to *all* the sons successively in tail male, and daughters concurrently [or successively] in tail general [or in tail special], are also to be construed as signifying *such issue*, even in the case of an executory trust (*r*).

"3rd. That words devising over the property on failure of issue *male*, following a devise to the whole line of sons successively in tail male, are also referential to those objects (*s*).

[4th. That where the children take a life estate only the words "in default of issue" introducing the gift over will create an estate tail by implication in the parent subject to the children's life estates (*t*).]

"5th. That where there is a prior devise to a *definite number of sons only* in tail male, with a limitation over in case of default of issue or issue male of the parent, an estate tail will also be implied in the parent, in order to give a chance of succession to the other sons (*u*).

"6th. That in the case of executory trusts, words importing *a dying without issue*, following a devise to the first and other sons of a particular marriage in tail male, authorize the insertion of a limitation to the parent in tail general, in remainder expectant on those estates (*x*).

"7th. That such words (whether they refer to issue or issue male), succeeding a devise to the eldest son [for life or] in tail, are not referable to such son exclusively, but create in the parent an implied estate tail (*y*), in remainder expectant on the estate [for life or in] tail of the son (*z*); and which rule also, it seems, applies where children [only who survive a specified period] take estates tail (*a*).

"8th. That the circumstance of the preceding devise to children, etc., being subject to a contingency (*b*) [or not including the whole subject of the devise over (*c*)] is rather unfavour-

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(*r*) *Blackborn* v. *Edgley*, 1 P. W. 600; *Morse* v. *Marquis of Ormonde*, 5 Mad. 99; 1 Russ. 382, *ante*, p. 1926; [*Peyton* v. *Lambert*, 8 Ir. Com. Law Rep. 485].

(*s*) *Bamfield* v. *Popham*, 1 P. W. pp. 54, 760; 1 Eq. Ca. Ab. 183; 2 Vern. pp. 427, 449.

[(*t*) *Doe* v. *Gallini*, 3 Ad. & Ell. 340, *ante*, p. 574; *Parr* v. *Swindels*, 4 Russ. 283; and *per* Lord Kingsdown, *Towns* v. *Wentworth*, 11 Moo. P. C. C., at p. 546.]

(*u*) *Langley* v. *Baldwin*, cit. 1 P. W. 759; 1 Eq. Ca. Ab. 185, pl. 29, cit. 1 Ves. Sen. 26; *Att.-Gen.* v. *Sutton*, 1 P. W. 754; 3 B. P. C. Toml. 75.

(*x*) *Allanson* v. *Clitherow*, 1 Ves. Sen. 24.

(*y*) *Stanley* v. *Lennard*, 1 Ed. 87; [*Key* v. *Key*, 4 D. M. & G. 73].

(*z*) *Doe* d. *Bean* v. *Halley*, 8 T. R. 5.

(*a*) *Doe* v. *Gallini*, 5 B. & Ad. 621, 3 Ad. & Ell. 340.

(*b*) *Doe* v. *Lucraft*, 8 Bing. 386; 1 M. & Sc. 573; *Alexander* v. *Alexander*, 16 C. B. 59; [*Doe* v. *Gallini*, *supra*].

(*c*) *Franks* v. *Price*, 6 Scott, 710; 5 Bing. N. C. 37; 3 Bea. 182.

able to the construction, which reads words importing a failure of issue to refer to a failure of the objects of such preceding devise."

Law under the Wills Act.

The only practical importance of the above propositions, as regards wills which operate under the Wills Act, is to indicate classes of cases in which the referential construction has been rejected. In the case of a will made or republished since 1837, the question can still arise whether words importing a failure of issue are referable to the objects of the preceding devise: and as Mr. Jarman points out (*d*), "if this question be decided in the affirmative, the construction will not be in the least affected by the change in the law; but if it be adjudged that the words under discussion do not refer to the objects of the prior devise, the result now will be widely different; for, instead of being construed (as formerly) to import an indefinite failure of issue, they must (unless the context forbids) be held to point exclusively to issue living at the death, and, consequently, can never, under any circumstances, by their own intrinsic force, have the effect of creating an estate tail by implication; so that as to wills made or republished since the year 1837, no scope will be afforded for the application of the doctrine of the cases of *Doe* v. *Halley*, *Parr* v. *Swindels*, and *Doe* v. *Gallini*, to the discussion of which so large a space has been devoted.

Effect under the Wills Act of rejecting the referential construction.

"The effect of holding the words in question *not* to refer to the issue who are the objects of a preceding devise, will be to render the estate of the children, conferred by such devise, determinable on the event of the parent dying without leaving issue living at his death, as in the case of *Hutchinson* v. *Stephens* (*e*), which is a result that ill accords with probable intention. Such a case, however, can only occur where the devise to the children, or any other class of issue gives estates in fee, as it would under wills which are subject to the [Wills Act], even without words of limitation; for if the devise in question confers estates for life only, the determination of such estates is involved in the failure of the issue whose extinction is the contingency on which the ulterior devise depends. We see, therefore, in the effect of the new law, increased motive for adhering to the principle of the cases of *Goodright* v. *Dunham* and *Malcolm* v. *Taylor* (*f*), which it will be remembered authorize the proposition, that, where a devise to children in fee is followed by a devise over to take effect on the failure of the issue of the

(*d*) First ed., Vol. II, p. 414.
(*e*) 1 Kee. 240, *ante*, p. 1927.
(*f*) *Ante*, p. 1925.

parent of such children, the words importing a failure of issue refer to the children or other issue, who are the objects of the prior devise, which principle would, it is conceived, apply to devises embracing any other class of children, as sons or daughters (*g*).

"For instance, if lands are devised to A for life, with remainder to his sons, and if A should die without issue, then to B, each son of A, under the original devise, would, immediately on his birth, take a vested remainder in fee-simple in his own aliquot share; and if the subsequent words were held merely to refer to the objects of the prior devise, the ulterior limitation of course would not disturb or affect such vested remainder; but if the words in question were adjudged not to bear this construction, but to point to issue of every degree living at the death of A, they would subject the vested estates of the sons of A to an executory devise to take effect in the event of A dying without leaving issue *surviving him*, a result which it is conceived the Courts, when applying the new rules of construction, will not hesitate to reject, in deference to the authority of the cases just referred to. The enactment which makes a devise pass the fee-simple without words of limitation will, it is obvious, greatly extend the application of the doctrine of *Goodright* v. *Dunham*, and *Malcolm* v. *Taylor*; and in this respect seems to operate very beneficially, in concurrence with that which reads words importing a failure of issue as denoting issue living at the death, when not simply referential to the issue described in the prior devise.

"In the preceding remarks, the new enactment [section 29 of the Wills Act] has been regarded in its effect only upon the *prior* estates. With respect to the *ulterior* estate, *i.e.*, the estate which is to take effect on the failure of issue, its operation is more decidedly beneficial, for it prevents such ulterior devise from being rendered void for remoteness, where the words denoting the failure of issue would have the effect neither of referring to the objects of the prior devises, nor of creating an estate tail by implication."

(*g*) In *Treharne* v. *Layton*, L. R. 10 Q. B. 459, a testatrix by will, dated 1863, gave her real and personal estate to M. for life and after her death to her children; M. to make a weekly allowance to R. during his life: if M. "dies leaving no issue" the whole of the property to go to the next-of-kin, they making the same allowance to R. during his life. M. had only one child, who died before her. It was held in Ex. Ch., affirming Q. B., that "leaving" must be construed "having had." The Court proceeded wholly on the authority of *Maitland* v. *Chalie*, 6 Mad. 243, and similar cases (*ante*, pp. 1699 *seq.*), and no reference was made to the statute, or (expressly) to the doctrine discussed in this chapter.

CHAPTER LII.

Various effects of a limitation over in default of issue.

It must be observed that a limitation over in default of issue following an estate in fee to children or any other particular branch of issue operates as an alternative contingent remainder which is defeated the moment that, by birth of a child or other issue taking under the previous limitation in fee, such limitation in fee becomes vested. On the other hand, a limitation over in default of issue, following an estate for life or in tail given to the issue, is construed as a vested remainder expectant on the estate for life or in tail, and is not defeated by the birth of issue, but takes effect upon the determination of the estates for life or in tail limited to them. It is clear, therefore, that, according as the issue take (1) in fee, (2) in tail, or (3) for life, the words in default of issue mean : (1) if there never are any issue; (2) if there never are any issue, or being such, upon their deaths and the failure of their issue inheritable under the estate tail; (3) if there never are any issue, or being such, upon their deaths (*h*).

Devises of reversions.

III.—Devises of Reversions.—"Devises of reversions," as Mr. Jarman remarks (*i*), "sometimes give rise to a question which bears a strong analogy to that discussed in the present chapter. This occurs where a testator, having a reversion in fee, subject to estates tail belonging to the sons or other partial issue of a person (*k*), devises the reversion as property in the event of that person dying *without issue*, which necessarily raises the question whether these words refer to the determination of the subsisting estates, or to a general failure of issue, or, in other words, whether they are words of description or donation : in the former case the devise operates as an immediate disposition of the reversion (*l*); in the latter, it is an executory devise, and, as such, is [in cases governed by the old law] void for remoteness.

Whether words refer to determination of subsisting estates.

"A point of this nature occurred in the case of *Lady Lanesborough* v. *Fox* (*m*), where A having settled the lands in question

(*h*) This statement of the law is taken from the third edition of this work by Messrs. Wolstenholme and Vincent, Vol. II, p. 431, n. It is referred to with approval by Parker, J., in *White* v. *Summers*, [1908] 2 Ch., at p. 272.

(*i*) First ed., Vol. II, p. 406.

(*k*) "The writer has avoided suggesting the case of the limitations being to the testator's *own* sons, because such cases may perhaps be considered as falling within another principle, discussed in the next chapter. See *Sanford* v. *Irby*, 3 B. & Ald. 654, and other cases there discussed." (Note by Mr. Jarman.) As to *Sanford* v. *Irby*, and the other cases referred to by Mr. Jarman, see *ante*. In the first edition of this work, the referential principle of construction was discussed in Chap. XL, and the question whether the words "in default of issue," etc., imported an indefinite failure of issue, was discussed in Chap. XLI. In the sixth edition it was found convenient to throw the two chapters into one and to invert the order in which the two subjects above referred to are discussed.

(*l*) See *ante*, p. 1331.

(*m*) Cas. t. Talb. 262. "*Lady Lanesborough* v. *Fox* is not only right, but the result of it was to affirm the intention of the testator, not to con-

on the marriage of his son B, to the use of himself (A) for life, remainder to his son B for ninety-nine years, if he so long lived, remainder to the use of the first and other sons of B *on his intended wife to be begotten* successively in tail male, remainder to the heirs *male* of the body of B, with reversion to the right heirs of himself (A), by his will devised the lands contained in the settlement *on failure of issue of the body of* B *and for want of heirs male of his* (A's) *body, to his daughter* F *in tail*: and the House of Lords adjudged, in concurrence with the unanimous opinion of the Judges, that the will did not give an estate tail by implication to B, and that therefore the devise over to F was executory, and void, as being on too remote a contingency.

Observations upon *Lanesborough* v. *Fox*.

"If this case had rested solely on the circumstances that the subsisting estate tail in B embraced the heirs *male* only, and the devise in the will referred to his (B's) issue *generally*, (which certainly was argued as the chief point in the case,) the decision, it is conceived, could hardly have been sustained, consistently with the rules of construction deducible from the cases discussed in the present chapter, in many of which we have seen, that words referring in terms to issue or issue male have been held to apply to *children* or *sons*, being the objects of the antecedent limitations (*n*). *A fortiori*, therefore, in the present instance would they have been construed to be referential, where the approximation to a correct reference to the subsisting estates was such as to require only the word 'male' to be supplied; and the case of *Tuck* v. *Frencham* (*o*) affords an instance (if authority were requisite) of this word being supplied to make words referring to issue generally correspond with the antecedent limitations in favour of issue male created by the same will.

Whether words of contingency refer to subsisting estate tail.

"These remarks assume that the principle which governs the application of phrases of this nature to limitations created by the same will, and to estates antecedently created, is identical. It seems difficult to find a solid distinction between the cases, especially where, as in *Lanesborough* v. *Fox*, the testator refers to the settlement in describing the subject of disposition; the difference between the two cases, indeed, if any, would seem to be, that the courts would incline more strongly to the referential construction in the latter case, where the effect is to support a devise otherwise void (*p*), than in the former, where as an estate tail can generally be implied, the devise is valid *quacunque via*.

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tradict it": *per* Lord Loughborough, *Lytton* v. *Lytton*, 4 Br. C. C., at p. 459.

(*n*) *Ante*, p. 1930.

(*o*) Moore, 13, pl. 50; 1 And. 8; *ante*, p. 555.

(*p*) "It will be remembered that we are here speaking of the *old* law." (Note by Mr. Jarman.)

The preferable ground, however, upon which the case of *Lady Lanesborough* v. *Fox* appears to stand, is afforded by the other words 'and for want of heirs male of my own body;' for, as the testator had no estate tail, and none could be implied, it is clear that, unless the words could be held to refer to issue *living at the decease of the testator*, according to the rule discussed in the next chapter (*q*) (in which it will be seen there was considerable difficulty, inasmuch as the testator had a son living) the devise was void (*r*).

Whether sons of an existing or future marriage were referred to.

"The principle was again agitated in the case of *Jones* v. *Morgan* (*s*); where A having, on his marriage with B, settled certain estates upon himself and the sons of the marriage in tail male, with reversion in fee to himself, and, having two sons of the marriage, devised the estates, in case his said sons, *or any other son or sons of his thereafter to be born, should die without issue male of their bodies*, to his brother T. The question was, whether the testator, by the mention of sons 'to be born,' was to be understood as meaning after-born sons by his wife B (who was living), or as having in his contemplation the sons of a future marriage (*t*). If confined to sons of A's present marriage, it was a good devise of the reversion, as the contingency expressed by him (on which the devise over was to take effect) embraced precisely the estates under the settlement, on the determination of which his own reversion would fall into possession, it being the same as if he had said, 'Whereas my estate is settled upon my first and every other son in tail male by my marriage settlement; therefore, in case they all die without issue male of their body, I give it to my brother,' which would clearly have been good as a devise of the reversion; and a circumstance much relied upon for this construction was, that the testator appointed B a guardian of his children and executrix of his will, which negatived the supposition of his contemplating a future marriage (*u*). On the other hand, it was contended, that the expressions used by the testator included the sons of an after-

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(*q*) The rule in question is mentioned *ante*, p. 1916; the order of Mr. Jarman's treatment of the subject having been inverted, as explained in note (*k*) above.

(*r*) "It is remarkable that Mr. Fearne, in his strictures on this case, Cont. Rem. 447, while he treats the want of the word 'male' as a fatal omission in referring to the estate tail of the testator's son, seems to consider it not impossible that the words *for want of the testator's own heirs male* should be held to be referential to the son, though this hypothesis takes so much greater liberty with the testator's language." (Note by Mr. Jarman.)

(*s*) Butl. Fea. App. 577; 3 B. P. C. Toml. 323.

(*t*) After the Wills Act children of a future marriage could not have been contemplated, because that marriage would have revoked the will.

(*u*) See this principle applied to a different species of case, *Wilkinson* v. *Adam*, 1 V. & B. 422, *ante*, p. 1730. It will be remembered that since the Wills Act a will is revoked by marriage.

taken wife, and, as such sons could not take an estate by implication, the limitation over to the testator's brother was an executory devise void for remoteness. Lord Chancellor Camden sent a case to B.R., the Judges of which certified their opinion that the event of a second marriage was not in the testator's contemplation, but that, if it were, the sons of that marriage took an estate tail. Lord Bathurst, who, in the meantime, had succeeded to the seals, concurred in the former branch of this certificate, and decreed accordingly; but he dissented from the opinion, that an estate tail was raised by implication, conceiving *Lanesborough* v. *Fox* to be a direct authority against it. The decree was affirmed in the House of Lords, on the ground that a future marriage was not in the contemplation of the testator, and that the devise to his brother was therefore good (*x*).

Words held to refer to subsisting estate tail.

"But in *Bankes* v. *Holme* (*y*), where lands having been limited, upon the marriage of A with B, to the use of A for life, with remainder to trustees to preserve, with remainder to trustees for certain terms of years, with remainder to B for life, remainder to trustees to preserve, remainder to the first and other sons of the marriage in tail male, with remainder to the daughters as tenants in common in tail, with cross remainders, with reversion to A, the settlor, in fee; A made his will, by which he recited that by the settlement in question, he was seised of or entitled to the reversion in fee-simple expectant on the decease of his wife B, in case there should be no child or children of his said wife by him begotten, or, there being such, all of them should happen to depart this life *without issue*. The testator then, in case he should die without leaving any children or child, or, there being such, 'all of them should happen to depart this life *without issue* lawfully begotten,' devised the premises upon certain trusts. Sir J. Leach, V.-C., held, that this devise, being after a general failure of issue of the children, was too remote and void; and this decree was affirmed in the House of Lords.

Words held not to refer to subsisting estates.

"Lord Eldon observed in *Morse* v. *Lord Ormonde* (*z*) that this was a 'very strong decision' (an expression which, in the mouth of this venerable Judge, always means a *wrong* decision); and it seems, indeed, to be very difficult to reconcile it with the principles of the line of cases just stated. It was manifest, from

Bankes v. *Holme* questioned.

(*x*) "In *Trafford* v. *Boehm*, 3 Atk. 440, a devise, 'after failure of issue' of the testator's wife by him, was construed as an immediate gift of the reversion, the words in question being referential to the subsisting limitations of their marriage settlement; but the will contained an express reference to the settlement (the particular limitations of which do not appear) for another purpose." (Note by Mr. Jarman.) See also *Lytton* v. *Lytton*, 4 Br. C. C. 441, where the cases are discussed.

(*y*) 1 Russ. 394, n. See also *Bristow* v. *Boothby*, 2 S. & St. 465.

(*z*) 1 Russ. 405; Sugd. Law of Prop. 351.

the recital of the settlement, that the testator had in view the reversionary estate expectant on the limitations of the settlement, whatever that reversion was; and the terms used were merely an erroneous and mistaken reference to the events on which such reversion would fall into possession. The case seems irreconcileable with *Jones* v. *Morgan*, which it closely resembles. It is not likely that the decision will be followed (*a*).

"And this conclusion is fortified by *Egerton* v. *Jones* (*b*), where, in pursuance of marriage articles, an estate at C. had been conveyed to the use of A for life, with remainder to B, his wife, for life, with remainder (subject to a term of 500 years for raising portions for younger children) to the use of the first and other sons of A and B successively in tail male, with remainder to the use of trustees for 600 years upon certain trusts, in the event of there being no male issue of A and B who should live to attain the age of twenty-one years, with remainder to the use of A, his heirs and assigns,—A, by his will, devised as follows :—'And as to the reversion and inheritance of the freehold estate by me already purchased at C. aforesaid, and such other estate or estates as I shall hereafter purchase in pursuance of my marriage articles, *in case of failure of issue of my body by my said wife*, I give,' etc. Sir L. Shadwell, V.-C., expressed a strong opinion that this devise operated as a valid immediate gift of the reversion; but it was not necessary for him to go further than to declare that the title depending on the opposite construction was too doubtful to be forced on a purchaser.

Devise on failure of issue held to be an immediate devise of reversion.

"If the V.-C. had been called upon to adjudicate on this point of construction, it is conceived his decision must have been in accordance with his expressed opinion. The case of *Jones* v. *Morgan* would have more than warranted, and even *Bankes* v. *Holme* would not have opposed, such a conclusion; for the Court had not here (as in those cases) to supply words in order to restrict the issue spoken of in the will to the issue of a particular marriage (who were the tenants in tail under the settlement), the testator having in the will distinctly referred to the issue of that marriage.

Remark on *Egerton* v. *Jones*.

"The sound rule would seem to be, that, wherever it may be collected from the general context of the will, that it is the testator's intention to dispose of his reversionary interest expectant on the subsisting estates tail, such intended disposition will not be defeated by the neglect of the testator to adapt his

Suggested conclusion from the cases.

(*a*) This paragraph is referred to by Sir J. Romilly, M.R., in *Lewis* v. *Templer*, 33 Bea., at p. 629.

(*b*) 3 Sim. 409; and see *Eno* v. *Eno*, 6 Hare, 171, further confirming the view taken in the text.

language with precision to the events on which the reversion will fall into possession. The consequence of rejecting this construction commonly has been (we have seen), to invalidate the intended devise of the reversion for remoteness (as depending upon a general failure of issue); but in this respect the recent act [the Wills Act, 1837] has made an alteration," for as we have seen (*c*) where the words denoting the failure of issue have the effect neither of referring to the objects of the prior devise, nor of creating an estate tail by implication, the effect of the Wills Act is to prevent the ulterior devise from being void for remoteness.

(*c*) *Ante*, p. 1914.

CHAPTER LIII.

WHAT WORDS WILL CHARGE REAL ESTATE WITH DEBTS AND LEGACIES.

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I.—Preliminary.—Under the old law, the right of the creditors of a deceased person to obtain satisfaction of their debts out of his real estate was extremely limited, for at common law it was restricted to the case of an owner of freehold land dying intestate having contracted debts by specialty, in which his heirs were expressly bound. The combined effect of the Statute of Frauds, the Statute of Fraudulent Devises (*a*), the Debts Recovery Act, 1830 (*b*), and the Administration of Estates Acts, 1833 (*c*) and 1869 (the latter of which is still popularly known as Hinde Palmer's Act), has been to make all the land of a deceased person liable for his debts, and to put all specialty and simple contract debts on an equal footing in this respect (*d*).

(*a*) Stat. 3 W. & M. c. 14. *Wilson* v. *Knubley*, 7 East, 128; *Hunting* v. *Sheldrake*, 9 M. & W. 256.

(*b*) As to what is a *bona fide* alienation by an heir or devisee so as to exempt the land from execution in the hands of the alienee under the Statute of Fraudulent Devises and the Debts Recovery Act, 1830, see *Coope* v. *Cresswell*, L. R. 2 Ch. 112; *British Mutual Investment Co.* v. *Smart*, L. R. 10 Ch. 567; *Re Hedgely*, 34 Ch. D. 379; *Re Atkinson*, [1908] 2 Ch. 307.

(*c*) As to the operation of this Act, see *Re Hyatt*, 38 Ch. D. 609; *Re Moon*, [1907] 2 Ch. 304. As to the effect of the Real Property Limitation Act, 1874, see *Re Welch*, [1916] 1 Ch. 375; as to section 8 of the Trustee Act, 1888, *Re Blow*, [1914] 1 Ch. 233.

(*d*) As to the administration of the estate of an insolvent testator, see next chapter.

But under the old law a testator could always charge his real estate with the payment of his debts, with the result of making his specialty and simple contract debts payable *pari passu* (*e*), and hence it was a question of importance (and sometimes too of no small difficulty) to determine in any particular case whether such a charge was in point of fact created by the will. Although the importance of the subject has been much diminished by the statutes above referred to, the question may still arise, for the executor's right of retainer is not taken away by these acts (*f*); and by the Act of 1869 it is not extended so as to enable the executor to retain his debt as against a creditor of higher degree than himself (*g*); nor do the acts give to an executor a right of retainer as regards real estate (*h*). Again, the question whether a testator has charged his debts on his real estate was often of importance with reference to the right of a legatee to marshal the assets (*i*).

In commenting on the effect of the Act of 1833, Mr. Jarman points out (*j*) that "Under the statute the creditors have not (as in the case of an actual charge) any lien on the estate (*k*). If, therefore, it is parted with by the heir or devisee before the creditor has pursued his remedy, the estate cannot be followed; though the creditor's lien under an actual charge is of no great value to him since it does not prevail against a *bona fide* purchaser for a pecuniary consideration; the well-known rule being that such purchasers are not bound to see their money applied in payment of debts under a general charge (*l*). Hence it is obvious that the inquiry whether real estate is or is not charged with debts by certain expressions in a will is still important, even in regard to the wills of testators dying since the 29th of August, 1833." Neither the Act of 1869, nor the Land Transfer Act, 1897, made any difference in this respect.

Power of sale.

A charge of debts, or of debts and legacies, generally confers an implied power of sale, but in whom it is vested, and how

(*e*) Williams, Real Prop. p. 332 (24th ed.).

(*f*) *Crowder* v. *Stewart*, 16 Ch. D. 368.

(*g*) *Re Harris*, [1914] 2 Ch. 395; *Re Samson*, [1906] 2 Ch. 584; *Re Jenner*, 53 Sol. J. 376; *Olpherts* v. *Coryton*, [1913] 1 Ir. R. 211. As to retainer by the heir-at-law or devisee against a creditor, by specialty, see *Re Illidge*, 27 Ch. D. 478.

(*h*) *Walters* v. *Walters*, 18 Ch. D. 182; but see now the Administration of Estates Act, 1925, s. 34.

(*i*) *Post*, pp. 2028 *seq.*

(*j*) First ed., Vol. II, p. 511.

(*k*) 4 My. & Cr., at p. 268. See also *Spackman* v. *Timbrell*, 8 Sim. 253; *Richardson* v. *Horton*, 7 Bea. 112; *Pimm* v. *Insall*, 1 Mac. & G. 449; *Coope* v. *Cresswell*, L. R. 2 Eq. 106; 2 Ch. 112; *Re Hedgely*, 34 Ch. D. 379; *Re Atkinson*, [1908] 2 Ch. 307.

(*l*) Sug. V. and P. (14th ed.), 655. And where debts and legacies are charged, the exemption extends to both, and even, it seems, to annuities: *Page* v. *Adam*, 4 Bea, 269, cit. 1 D. M. & G., at p. 650.

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far a person purchasing under it is exempt from inquiry, are questions which may still give rise to difficulty, although they can hardly arise in the case of testators dying since 1897 (*m*). The subject is referred to in the chapter on Trusts, in connection with trusts and powers of sale.

Statute of Limitations.

A charge of debts on real estate extends the period of limitation to twelve years; and the Land Transfer Act, 1897, made no difference in this respect (*n*).

New law.

The new law, which applies to persons dying after 1925, has, as will be seen in the next chapter, assimilated the liability of the real estate with that of the personal estate to bear the debts and legacies; consequently many of the questions raised in the cases cited in this chapter will not arise under wills which come into operation after 1925.

II.—Express Charge of Debts and Legacies.—Sometimes a testator expressly charges his debts, or legacies, or both, on his real estate or on part of it, and then the questions which generally arise are whether the testator intends not only to charge his real estate but to exonerate the personalty, and (in the case of debts) what kinds of debts are included in the charge. The former of these questions is discussed in another chapter (*o*).

With regard to the latter question, the Courts have construed the expression "debts" with considerable latitude, as will be seen from the cases cited below (*p*).

(*m*) As to the effect of the Land Transfer Act, 1897, see *Re Kempster*, [1906] 1 Ch. 446; *Re Balls*, [1909] 1 Ch. 791.

(*n*) *Re Stephens*, 43 Ch. D. 39; *Re Balls*, [1909] 1 Ch. 791; *Re Raggi*, [1913] 2 Ch. 206 (mixed fund).

(*o*) Chap. LIV., *post*, p. 1992. Where a devisee of land charged with legacies pays them off he may show an intention to keep the charge alive for his own benefit: *Re Bayly's Estate*, [1898] 1 Ir. R. 383.

(*p*) Under a charge of "debts" in a will are included all liabilities to which the personal estate is liable; as, damages for a breach of covenant occurring after the testator's death; see *Earl of Bath* v. *Earl of Bradford*, 2 Ves. Sen. 587; *Lomas* v. *Wright*, 2 My. & K. 769; *Willson* v. *Leonard*, 3 Bea. 373; *Morse* v. *Tucker*, 5 Hare, 79; *Eardley* v. *Owen*, 10 Bea. 572; *Bermingham* v. *Burke*, 2 J. & Lat. 699. So, a sum covenanted to be left by *will* (which is a specialty debt), *Eyre* v. *Monro*, 26 L. J. Ch. 757. But as to a covenant that a person shall have an aliquot share of the testator's estate, see *ante*, p. 1136. As to the liability of an incumbent's estate for dilapidations, see *Bisset* v. *Burgess*, 23 Bea. 278. The Act 3 & 4 Will. 4, c. 104, is equally extensive, *Ex p. Hamer*, 2 D. M. & G. 366. A charge of debts in an English will was held to include a debt secured by heritable bond on a Scottish estate, *Maxwell* v. *Maxwell*, L. R. 4 H. L. 506. Money lent to the testator during infancy for necessaries may constitute a debt for this purpose (*Marlow* v. *Pitfeild*, 1 P. & W. 558). And there are old cases in which the Courts have strained the language of a testator with regard to the payment of his debts, on the theory that such a course is permissible in the interest of "moral justice": see *Bridgman* v. *Dove*, 3 Atk. 201; *Dormay* v. *Borradaile*, 10 Bea. 335. See further as to the meaning of "my debts" or "moneys owing by me" in a charge of debts: *Re Warnock's Estate*, Ir. R. 11 Eq. 212; *Martin* v. *Smyth*, 3 L. R. Ir. 417; 5 L. R. Ir. 266. As

Whether charge of debts includes future debts.

It is also to be observed, as Mr. Jarman remarks (*q*), "that, in construing provisions for payment of debts, the Courts are averse to an interpretation which would restrict the provision to debts subsisting at a given period during the life of the testator; and therefore, although words in the present tense generally refer to the time of making the will (*r*), yet it has been held that, a charge of all the debts, 'I *have* contracted since 1735' extended to future debts" (*s*). Lord Hardwicke said, "If it had been 'all debts that I owe,' still it would be extended to the time of her death."

On the same principle, where a testator charged his real estate with his debts "of which he should leave an account," and left an account omitting some, all were held to be charged (*t*).

"All my debts."

It is hardly necessary to say that the expression "all my just debts" includes all debts owing by the testator at his death (*u*).

III.—Effect of a General Direction that Debts shall be Paid.—It may now be considered settled that a general direction by a testator that his debts shall be paid charges them on the real estate devised by the will (*v*).

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to mortgage debts, see *post*, pp. 1982 *seq.* Debts barred by the Statute of Limitations are not included, *Burke* v. *Jones*, 2 V. & B. 275, but in the case of debts not barred at the testator's death, a charge of them on the real estate extends the statutory period to twelve years: *Re Stephens*, 43 Ch. D. 39; *Re Balls*, [1909] 1 Ch. 791. *Secus* in the case of personalty. A claim though not statute-run may forfeit the benefit of a charge by laches: *Harcourt* v. *White*, 28 Bea. 303. But a direction to deduct from a child's share "debts" owing by her to the other children was held to include statute-run debts, the object being to make equal distribution: *Poole* v. *Poole*, L. R. 7 Ch. 17. If a devise for payment of debts does not provide for such payment in a practicable manner, it is within the statute of fraudulent devises: *Hughes* v. *Doulbin*, 2 Cox, 170. A charge of the debts of another person then deceased, includes all his debts not barred at *his* death: *O'Connor* v. *Haslam*, 5 H. L. C. 170. But *qu.* whether a charge of the debts of one who survives the testator would include debts contracted after the testator's death unless (as in *Joel* v. *Mills*, 30 L. J. Ch. 354) the trustees have a discretion. Whether the charge entitles creditors of the third person to interest depends on the terms of the will: *Askew* v. *Thompson*, 4 K. & J. 620; *Poole* v. *Poole*, *supra.* As to liabilities which are debts by foreign but not by English law, see *Re Brewster*, [1908] 2 Ch. 365; and *Re De Sommery*, [1912] 2 Ch. 622.

(*q*) First ed., Vol. II, p. 530.

(*r*) This is perhaps too broadly stated: see *ante*, pp. 372, 391.

(*s*) *Bridgman* v. *Dove*, 3 Atk. 201.

(*t*) *Dormay* v. *Borradaile*, 10 Bea. 263.

(*u*) *Maxwell* v. *Maxwell*, L. R. 4 H. L. 506.

(*v*) Mr. Jarman examines in some detail the authorities, including *Legh* v. *Earl of Warrington*, 1 Br. P. C. 511 (of which he says that it has always been regarded as a leading authority); *Williams* v. *Chitty*, 3 Ves. 545; *Clifford* v. *Lewis*, 6 Mad. 33; *Graves* v. *Graves*, 8 Sim. 43; *Ball* v. *Harris*, 8 Sim. 485; 4 My. & Cr. 264; *Shaw* v. *Borrer*, 1 Kee. 559; *Harding* v. *Grady*, 1 D. & War. 430, and *Parker* v. *Marchant*, 1 Y. & C. C. C. 290. In some of the earlier cases there is some unprofitable discussion as to the effect of the direction to pay debts being introduced by the words "in the first place" or "imprimis," which Mr. Jarman treats as wholly immaterial. See also *Corser* v. *Cartwright*, L. R. 7 H. L. 731; *Luckcraft* v. *Pridham*, 48 L. J. Ch. 636. Mr. Jarman remarks (Vol. II, p. 520) that in laying down this rule of

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Absence of any devise or mention of realty.

"The only doubt," says Mr. Jarman (*w*), "which the preceding authorities admit of is, whether a general direction that debts shall be paid will throw them on real estate when contained in a will, the dispositions of which are otherwise confined to personalty; for it is observable that in all the cases which have yet occurred the will appears to have embraced real estate. The total absence of any devise or mention of realty would certainly be a new feature; though, considering the strong tendency of the recent cases in favour of such charges, it seems unlikely that any distinction of this nature will be established. So long ago as the case of *Shallcross* v. *Finden* (*x*) we have a dictum of Sir R. P. Harden which seems to bear upon the point under consideration: 'I am very clearly of opinion,' said this able Judge, 'that whenever a testator says that his debts shall be paid, that will ride over every disposition, either against his *heir-at-law* or devisee.'"

Condition.

A charge of debts may be created in the form of a condition imposed on a devisee of the land (*y*), unless the circumstances show that this cannot be the testator's meaning (*z*).

Authority.

A mere discretionary authority to pay debts does not charge them on the testator's real estate (*a*).

Exceptions to the general rule.

First exception, where specific fund appropriated.

IV.—Exception where a Specific Fund is Appropriated.—Mr. Jarman continues (*b*): "The rule, however, seems to be subject to two material exceptions. First, where the testator, after generally directing his debts to be paid, has provided a specific fund for the purpose (*c*).

Not affected by express charge on residuary personal estate,

"However, it is clear, that a charge created by general introductory words is not controlled by a subsequent passage furnishing conjecture only of a contrary intention, and not

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construction it seems to be generally admitted "that the Courts have allowed their anxiety to prevent moral injustice, by the exclusion of creditors, 'and that men should not sin in their graves,' to carry them beyond the limits prescribed by established general principles of construction."

(*w*) First ed., Vol. II, p. 520.

(*x*) 3 Ves. 738.

(*y*) *Mead* v. *Hide*, 2 Vern. 120; *Re Kirk*, 21 Ch. D. 431.

(*z*) *Bridgman* v. *Dove*, 3 Atk. 201, where the devisee only took a life interest.

(*a*) *Re Head's Trustees and Macdonald*, 45 Ch. D. 310.

(*b*) First ed., Vol. II, p. 520.

(*c*) In support of this proposition Mr. Jarman cites *Thomas* v. *Britnell*, 2 Ves. Sen. 313, and *Palmer* v. *Graves*, 1 Kee. 545, in each of which cases there was a general direction to pay debts, and a subsequent trust or charge for payment of them out of a specific property: it was held that the general charge by implication was destroyed by the subsequent specific provision. They were followed in *Re Major*, [1914] 1 Ch. 278. See also *Douce* v. *Lady Torrington*, 2 My. & K. 600; *Legh* v. *Earl of Warrington*, 1 B. P. C. Toml. 511, cit. 2 Ves. sen. 272, and Belt's Suppl. 361; *Corser* v. *Cartwright*, L. R. 8 Ch. 971, affirmed in D. P. on independent grounds, L. R. 7 H. L. 731. *West of England & South Wales District Bank* v. *Murch*, 23 Ch. D. 138.

actually inconsistent with such charge. As where (*d*) a testator, after willing all his just debts, funeral expenses, and the charges of proving his will to be paid, devised real estate, and gave some legacies, and then proceeded to bequeath all the residue of his personal estate, *after and subject to the payment of all his just debts, funeral and testamentary expenses and the legacies therein-before bequeathed.* Lord Lyndhurst, C., held that the latter words were not inconsistent with an intention to charge the real estate as an auxiliary fund; observing, that courts of equity had always been desirous of sustaining such charges for the benefit of creditors; and the presumption in favour of them was not to be repelled by anything short of a clear and manifest evidence of a contrary intention.

"And Sir L. Shadwell, V.-C., came to a similar conclusion on a special and very inaccurately framed will in the case of *Graves* v. *Graves*" (*e*).

—nor by charge of specific sums either on particular lands,

—or on all the real estates.

Again, in *Taylor* v. *Taylor* (*f*), Sir L. Shadwell decided that a direction that all the testator's just debts and funeral expenses should be fully paid and satisfied, was not cut down by a subsequent charge of specific sums on particular estates. And in *Forster* v. *Thompson* (*g*) it was held that no such result followed from a subsequent charge of a specific debt on a specified estate which appeared in fact to be the testator's only real estate.

First exception inapplicable to express charge.

"And here, it should be observed," says Mr. Jarman (*h*), "that the doctrine of the preceding exception extends only to charges on real estate created by general and ambiguous expressions; for, of course, a clear and explicit charge on real estate is not liable to be controlled by an express appropriation of particular lands to the purpose (*i*), or a qualified charge of the real estate in the same will" (*k*).

Second exception, where the payment is to be made by the executors.

V.—Exception where Direction is to Executors.—Mr. Jarman continues (*l*): "The second exception to the general rule under discussion occurs where the debts are directed to be paid by *executors*, in which case, unless land be devised to them, it will

(*d*) *Price* v. *North*, 1 Phil. 85, reversing 4 Y. & C. 509. As to this case, see *Re Major*, [1914] 1 Ch. 278. "The direction as to the personal estate, which is by law liable to those burthens, is mere redundancy, affording no inference of any definite purpose": *per* Plumer, V.-C., *Noel* v. *Weston*, 2 V. & B., at p. 272.

(*e*) 8 Sim. 43. See *Jones* v. *Williams*, 1 Coll. 156.

(*f*) 6 Sim. 246. See also *Clifford* v. *Lewis*, 6 Mad. 33, *ante*, p. 1943.

(*g*) 4 D. & War. 303; see also *Cross* v. *Kennington*, 9 Bea. 150; *Dormay* v. *Borradaile*, 10 Bea. 263.

(*h*) First ed., Vol. II, p. 522.

(*i*) *Ellison* v. *Airey*, 2 Ves. Sen. 568; *Coxe* v. *Basset*, 3 Ves. 155; *Noel* v. *Weston*, 2 V. & B. 269; *Wrigley* v. *Sykes*, 21 Bea. 337.

(*k*) *Crallan* v. *Oulton*, 3 Bea. 1.

(*l*) First ed., Vol. II, p. 523.

be presumed that payment is to be made exclusively out of funds which, by law, devolve to the executors in their representative character.

"Thus, in *Brydges* v. *Landen* (*m*), where the testator commenced his will as follows :—'*Imprimis*, that all my debts and funeral charges and expenses be, in the first place, paid *by my executrix* hereinafter named : then as to my real and personal estate, I dispose of as follows'; and, after making such disposition, he charged and made liable all his real and personal estate with two sums of £150 to each of his daughters. All the cases were considered by Lord Thurlow, who was clearly of opinion that the real estate was not charged."

Mr. Jarman also cites, as illustrating this rule of construction, *Keeling* v. *Brown* (*n*), *Powell* v. *Robins* (*o*), and *Willan* v. *Lancaster* (*p*).

Devise subject to debts.

But if a testator directs his debts to be paid by his executors, and "subject as aforesaid" devises his lands, they will be charged with the debts (*q*).

Where executor is devisee.

VI.—Distinction where Executors are Devisees of Real Estate.—"Where, however," says Mr. Jarman (*r*), "the executor is devisee of real estate, a direction even *to him* to pay debts or legacies will cast them upon the realty so devised."

In support of this Mr. Jarman cites *Awbrey* v. *Middleton* (*s*), *Alcock* v. *Sparhawk* (*t*), *Barker* v. *Duke of Devonshire* (*u*), and *Henvell* v. *Whitaker* (*x*), all of which are set out in the previous editions of this work.

Same rule where executor is devisee *in trust*.

And even where the land is devised to the executors upon trust for other persons, the effect is the same. Having the

(*m*) *Brydges* v. *Landen*, 3 Russ. 346, n., cited 3 Ves., at p. 550, where it is said that the circumstance that the debts were to be paid by the executrix was considered very important.

(*n*) 5 Ves. 359.

(*o*) 7 Ves. 209.

(*p*) 3 Russ. 108. In this case the effect of the word "then," following a direction to pay debts and introducing a devise, was discussed. See also *Braithwaite* v. *Britain*, 1 Kee. 206, and *Wisden* v. *Wisden*, 2 Sm. & Gif. 396.

(*q*) *Dowling* v. *Hudson*, 17 Bea. 248.

(*r*) First ed., Vol. II, 525.

(*s*) 2 Eq. Ca. Ab. 497, pl. 16; Vin. Ab. Charge (D), pl. 15; the will also contained an express devise of some lands to another person.

(*t*) 2 Vern. 228. See also *Goodright* d. *Phipps* v. *Allin*, 2 W. Bl. 1041; *Doe* d. *Pratt* v. *Pratt*, 6 Ad. & Ell. 180; *Elliot* v. *Hancock*, 2 Vern. 143; and of course the construction is not varied by renunciation of probate by the person named executor : *Lypet* v. *Carter*, 1 Ves. Sen. 499; and *per* Lord *Thurlow*, 1 Ves. Jun., at p. 446.

(*u*) 3 Mer. 310.

(*x*) 3 Russ. 343. See also *Dover* v. *Gregory*, 10 Sim. 393; *Harris* v. *Watkins*, Kay, 438; *Cross* v. *Kennington*, 9 Bea. 150 (aided probably by gift of "residue," see *post*, p. 1953).

estate, and being charged with the payment of the debts, they are to consider the creditors as having the first claim upon the trust. Thus, in *Dormay* v. *Borradaile* (*y*), where a testator commenced by giving all his property to his wife: he next appointed her and two others executors, and "to them his executors" gave certain real estates in trust for his wife and children, and concluded thus, "my executors are charged with the payment of my just debts," Lord Langdale, M.R., held that the real estates were charged with the debts.

"It is difficult," remarks Mr. Jarman (*z*), "to reconcile with this line of authorities the case of *Parker* v. *Fearnley* (*a*), where, a testatrix having directed legacies to be paid by her executor, to whom she devised all her real estate in fee, and also the residue of her personalty, after payment of her debts and funeral expenses, Sir J. Leach, V.-C., held, that the pecuniary legacies were not charged on the real estate devised to the executor.

Remark on *Parker* v. *Fearnley*.

"As this case was prior to, it must be considered as overruled by *Henvell* v. *Whitaker*, with which it is clearly inconsistent. Neither *Awbrey* v. *Middleton* nor *Alcock* v. *Sparhawk* was cited to, or noticed by, the Vice-Chancellor.

Effect where debts are to be paid by tenant in tail, etc.

"And the circumstances that the estate given to the devisee is an *estate tail*, and the direction to pay the debts is connected by juxtaposition with the bequest of the personalty and the appointment of executor, and separated by several intervening sentences from the devise of the lands, are, it seems, immaterial (*b*).

Where by tenant for life.

"It is not equally clear, however, that a direction to an executor to pay debts would have the effect of charging lands devised to him *for life* only. Undoubtedly, in *Finch* v. *Hattersley* (*c*) the real estate was held to be charged under circumstances of this nature; but it does not appear that the fact of the executrix being a devisee for life of the real estate had any influence upon the Court; and as the case was decided when a general direction to an executor to pay debts might possibly have been considered sufficient to charge them upon real estate *not devised to the executor* (the doctrine upon the subject being more lax and the distinctions less defined than at present) the

(*y*) 10 Bea. 263. See also *Bentley* v. *Robinson*, 10 Ir. Ch. R. 287; *Hartland* v. *Murrell*, 27 Bea. 204; *Re Tanqueray-Willaume and Landau*, 20 Ch. D. 465; *Re De Burgh Lawson*, 41 Ch. D. 568; *Re Stokes*, 67 L. T. 223; *Re Salt*, [1895] 2 Ch. 203.

(*z*) First ed., Vol. II, p. 526.

(*a*) 2 S. & St. 592.

(*b*) In support of this Mr. Jarman states *Clowdsley* v. *Pelham*, 1 Vern. 411.

(*c*) 3 Russ. 345, n.

case cannot be relied on as an authority on the point above suggested (*d*).

Effect where devise is to *one* of several executors.

"It is quite clear, however, that a limited estate devised to *one* of several executors in the testator's lands will not be charged with debts, under a direction to the executors to pay them (*e*). Indeed, such is clearly the rule even where an estate *in fee* is devised to *one* of several executors.

"Thus, in the case of *Warren* v. *Davies* (*f*), where a testator directed that his debts and legacies, funeral expenses and testamentary charges should be paid by his executors thereinafter named; and, after directing certain real estates to be sold by his executors on the decease of his wife, he devised certain messuages and lands to his son Thomas Davies, in fee, and gave him the residue of his real and personal estate. The testator appointed Thomas Davies *and another* executors. Sir J. Leach, M.R., held that the estate devised to Thomas Davies was not to be considered as charged with the debts and legacies directed to be paid by the executors, merely because the devisee happened to be one of the executors. And the same rule seems to have been acted upon by the same learned Judge, though without any distinct recognition of this ground of decision, in the subsequent case *Wasse* v. *Heslington*" (*g*).

Unequal devises to executors.

In the case last named, the M.R. remarked that it was manifest from the whole will (which contained express charges of various legacies and annuities) that the testator had no intention of charging his real estate with the payment of his debts. There were separate beneficial devises to the executors, and their interests were different. But if a testator directs that his debts shall be paid by his executors, and devises all his real estate to them in such a way that they take the legal estate upon trusts under which they take unequal beneficial interests, the debts are charged on the real estate (*h*).

Effect where part only of the realty is given to the executors.

On the other hand, even if the gift to the executors is one and undivided, the implied charge may be rebutted by the context; as, if part only of the real estate is given to them, and other parts to other persons; in such a case the distribution of the estate may be such as to make it very improbable that the testator intended that the former part should be charged, and

(*d*) As to this point see also *Doe d. Ashby* v. *Baines*, 2 C. M. & R. 23; *Harris* v. *Watkins*, Kay, 438, 447; *Cook* v. *Dawson*, 7 Jur. (N.S.) 130; 3 D. F. & J. 127. In the case last cited Romilly, M.R., expressed a clear opinion that the life estate was charged. See also the rule as stated by Fry, J., in *Re Bailey*, 12 Ch. D., at p. 273, *post*, p. 1949.

(*e*) See *Keeling* v. *Brown*, 5 Ves. 359.

(*f*) 2 My. & K. 49.

(*g*) 3 My. & K. 495.

(*h*) *Re Tanqueray-Willaume and Landau*, 20 Ch. D. 465, correcting the dictum of Wood, V.-C., in *Harris* v. *Watkins*, Kay, at p. 448.

the latter not (*i*); especially if the part given to the executors is not for them beneficially, but in trust for other persons (*j*).

General rule, stated by Fry, J.

The general rule has been thus stated (*k*): "Where there is a direction that the executors shall pay the testator's debts, followed by a gift of all his real estate to them, either beneficially or on trust, all the debts will be payable out of all the estate so given to them. The same rule applies whether the executors take the whole beneficial interest, as in *Henvell* v. *Whitaker* (*l*), or only a life interest, as in *Finch* v. *Hattersley* (*m*), or no beneficial interest at all, as in *Hartland* v. *Murrell*" (*n*). But the testator's intention must be ascertained from a consideration of the whole will, and if by reason of part of the realty being devised directly to one executor and part either to the other executor, or to some one else, the result of applying the general rule would be to charge the debts on the real estate in unequal proportions, this affords a presumption that the testator had no intention of charging them (*o*).

Where direction to executors to pay debts is followed by a devise to one of them "subject as aforesaid."

If a testator begins with a direction that his debts and legacies shall be paid by his executors and then, without any intermediate gift says, "and subject as aforesaid I give all the residue of my real estate to A" (who is a stranger or one of several executors), the real estate will be charged with debts and legacies, since there is no other way of giving a sense to the words "subject as aforesaid" (*p*).

Whether charge extends to several preceding subjects of disposition.

VII.—Whether a Devise of Real and also Personal Estate after Payment of Debts, etc., charges the Realty.—Mr. Jarman continues (*q*): "Where a testator gives his real and also his personal estate, after payment of debts, etc., it is sometimes a question whether these words extend to charge both the preceding subject of gift, or apply only to the immediate antecedent, namely, the personal estate.

"Thus, in the case of *Withers* v. *Kennedy* (*r*), where a

(*i*) *Symons* v. *James*, 2 Y. & C. C. C. 301.

(*j*) *Re Bailey*, 12 Ch. D. 268, where the debts were held to be charged on the residuary real estate, but not on the real estate specifically devised to the executors.

(*k*) *Per* Fry, J., in *Re Bailey*, 12 Ch. D., at p. 273, quoted with approval in *Re Tanqueray-Willaume and Landau*, 20 Ch. D. 465.

(*l*) *Ante*, p. 1946.

(*m*) *Ante*, p. 1947.

(*n*) *Ante*, p. 1947, n. (*y*).

(*o*) *Re Bailey*, 12 Ch. D. 268.

(*p*) *Dowling* v. *Hudson*, 17 Bea. 248.

(*q*) First ed., Vol. II, p. 528.

(*r*) 2 My. & K. 607; *Beachcroft* v. *Beachcroft*, 2 Vern. 690. See *Clarke* v. *Brereton*, 1 Jones, 165 (an Irish Exchequer case), where the charge was confined to personalty by force of the context.

testator, after bequeathing to his wife certain effects, gave, devised, and bequeathed all his freehold, copyhold, and leasehold estates whatsoever and wheresoever, and all the residue of his personal estate and effects, *after payment of his just debts and his funeral expenses and the charges of proving his will, and of carrying the trusts thereof into execution*, to trustees, their heirs, executors and administrators, upon trust for his wife for life, with other limitations over; it was contended that the personal estate being the natural fund for the payment of debts, it was a more obvious and natural construction to refer these words to the immediate rather than the more remote antecedent; that more remote antecedent being a species of property not legally liable to debts; but Sir J. Leach, M.R., though he admitted that the expression in the will afforded some colour to this argument, considered that, in plain construction, the words in question were to be referred to the freehold, copyhold, and leasehold property, as well as to the personal estate. His Honor considered it to be an objection to the opposite construction, that it imputed to the testator the intention of exempting his leaseholds from the payment of his debts, etc., which species of property was by law subject to them (*s*).

Kidney v. *Coussmaker.*

"In *Kidney v. Coussmaker* (*t*) the question was much contested whether, where a testator devises lands in trust to be sold, declaring that the produce shall go in the same manner as the personal estate, and then bequeaths the personalty, 'after payment of his debts,' the produce of the real estate was by these words (which were clearly inoperative in regard to the *personalty*) charged with the debts. It was not necessary to decide the point." It has, however, been generally considered as having been decided in the affirmative in that case, and the rule is clearly established (*u*).

Whether same words will charge legacies as debts.

VIII.—Whether Legacies and Annuities are charged by the same words as Debts, etc.—Mr. Jarman continues (*v*): "It has sometimes been made a question, whether similar words which will charge real estate with *debts* will suffice to onerate it with legacies; or whether, in order to throw legacies upon the land, a clearer manifestation of intention is not requisite. Sir R. P. Arden, and Lord Loughborough, were long at issue upon the point; the former maintaining, and the latter denying, the

(*s*) *Moores* v. *Whittle*, 22 L. J. Ch. 207, is to the same effect, but there were no leaseholds, only copyholds for lives.

(*t*) 1 Ves. Jun. 436; 7 B. P. C. Toml. 573. See also 2 Ves. Jun. 267.

(*u*) *Soames* v. *Robinson*, 1 My. & K. 500; *Shakels* v. *Richardson*, 2 Coll. 31; *Re Woollard's Trust*, 18 Jur. 1012; *Bright* v. *Larcher*, 3 De G. & J. 148; *Field* v. *Peckett*, 29 Bea. 568.

(*v*) First ed., Vol. II, p. 530.

distinction (*w*), which, however, did not originate with Sir R. P. Arden; for it is to be traced in the early case of *Davis* v. *Gardiner* (*x*), where the testator commenced his will thus: 'As to my worldly estate, I dispose of the same as follows, *after my debts and legacies paid*'; and then gave several legacies, adding, 'After all my legacies paid, I give the residue of my *personal* estate to my son,' and then devised his lands: and Lord Macclesfield held that the legacies were not a charge upon the realty; his Lordship observing, that 'as plain words are necessary to disinherit an heir, so words equally plain are requisite to charge the estate, of an heir, which is a disinherison *pro tanto*.' In a note to this case the reporter adds that, if there had been a want of assets for the payment of debts, it seems that the land would have been charged therewith.

"As to my worldly estate, *after my debts and legacies paid.*"

"The distinction in question appears to have been a natural consequence of the extreme length which the Courts had gone in holding *debts* to be charged by loose and equivocal expressions, the unfairness of which, when applied to legacies, became apparent, 'there being no reason (as Sir R. P. Arden has observed), why a specific devise should not take effect as much as a pecuniary one' (*y*).

As to distinction between debts and legacies.

"In *Trott* v. *Vernon* (*z*), however, and several of the other cases before stated (*a*), in which debts and legacies were coupled in one clause, there is no mention of any such distinction; and instances may certainly be adduced from the later cases in which legacies have been held to be charged upon land by expressions of a character scarcely more decisive than those which have this operation in regard to debts."

Thus in *Preston* v. *Preston* (*b*), a testator devised real estate in fee to his son, who, it is stated, was his executor; also he gave him his stock of cows, rest, residue, and remainder of his effects; and that he should pay to the testator's grandson £300; it was held by Sir J. Stuart, V.-C. (*c*), that the real estate was charged with the grandson's legacy. *Parker* v. *Fearnley* (*d*), he said, was overruled by *Henvell* v. *Whitaker* (*e*).

Words sufficient to charge legacies.

(*w*) *Kightley* v. *Kightley*, 2 Ves. Jun. 328; *Williams* v. *Chitty*, 3 Ves. 545; *Keeling* v. *Brown*, 5 Ves. 359.

(*x*) 2 P. W. 187.

(*y*) 3 Ves. 739.

(*z*) 2 Vern. 708. See also *Tompkins* v. *Tompkins*, Pr. Ch. 397; *Alcock* v. *Sparhawk*, 2 Vern. 228.

(*a*) Mr. Jarman here refers to *Newman* v. *Johnson*, 1 Vern. 45, and *Davis* v. *Gardiner*, 2 P. W. 187, which are cited in the first edition in support of the proposition that a general direction to pay debts charges them on the real estate; *ante*, p. 1943.

(*b*) 2 Jur. (N.S.) 1040. See also *Cross* v. *Kennington*, 9 Bea. 150.

(*c*) Citing *Alcock* v. *Sparhawk*, 2 Vern. 228; 1 Eq. Ca. Ab. 198, pl. 4, *ante*, p. 1946.

(*d*) *Ante*, p. 1947.

(*e*) *Ib.*

So in *Gallemore* v. *Gill* (*f*), where a testatrix bequeathed her wearing apparel and furniture to her niece, and gave all her real and the residue of her personal estate to trustees, in trust to pay her debts and funeral expenses and a legacy of £10 to her servant out of her personal estate, and to pay out of her real estate so much of her debts and funeral expenses as her personal estate should be insufficient to satisfy, and subject thereto as to the entire residue of her estate and effects in trust for her three grandchildren. By codicil the testatrix directed the trustees acting under her will (who it appears were also her executors) to pay to her servant £40 in addition to the £10, and in addition to the bequest above mentioned to pay a life annuity to her niece. It was held that the legacies given by the codicil were charged on the real estate.

Devise "after payment" of legacies.

In *Re Adams and Perry's Contract* (*g*) a testator bequeathed certain legacies and gave the residue of his real and personal estate to trustees upon trusts for his wife and niece during their lives, and after the decease of the survivor he directed his trustees to pay two legacies of £150 each, and that after payment thereof they should stand possessed "of my said real estate and the residue of my personal estate" upon certain trusts. It was held that both under the rule in *Greville* v. *Browne* (*h*) and by reason of the words "after payment," the two legacies of £150 each were charged on the real estate (*i*).

Where real estate not devised to executors.

On the other hand, if the real estate is not devised to the executors, a direction to pay legacies out of the testator's estate *prima facie* applies only to the personalty. Thus in *Re Cameron* (*j*), a testator empowered his executors to realise such part of his "estate" as they should think right to pay certain legacies, but the will did not contain any devise of real estate except a gift of a particular house, it was held that the legacies were not charged on the real estate; the direction to the executors being satisfied by holding the word "estate" to apply only to property which they took as executors, *i.e.*, the personalty.

Devise upon condition.

A devise of land to A upon condition that he pays a legacy to B charges the legacy on the land (*k*).

Mixed fund.

It is clear that the rule in *Kidney* v. *Coussmaker* (*l*) applies

(*f*) 2 Sm. & G. 158; 8 D. M. & G. 567.
(*g*) [1899] 1 Ch. 554.
(*h*) *Post*, p. 1953.
(*i*) Compare the cases *ante*, p. 1949.
(*j*) 26 Ch. D. 19.
(*k*) *Wigg* v. *Wigg*, 1 Atk. 382.
(*l*) *Ante*, p. 1950.

to legacies as well as to debts (*m*); although the personalty is not in terms charged with the payment of them (*n*).

Giving legacies, and then *the rest* of the real and personal estate, charges the legacies.

It is also clear that where legacies are given and then "all the residue of the real and personal estate," the legacies are charged on the realty. Thus, in *Hassel* v. *Hassel* (*o*), where the testator devised and bequeathed certain legacies, and then gave, devised and bequeathed all his real and personal estate not thereinbefore disposed of; Lord Bathurst held that the legacies were charged upon the real estate.

Greville v. *Browne.*

In *Greville* v. *Browne* (*p*), where a testator, after bequeathing an annuity and some pecuniary legacies, gave "all the rest residue and remainder of any property he might die possessed of or entitled to of what nature soever" to his son, it was held in the House of Lords that the legacies were charged on the real estate. There was no previous devise of real estate; but it was laid down in the most general terms, that where there is a bequest of legacies followed by a gift of the residue of the testator's property, real and personal, the legacies are charged on the realty. "It is considered," said Lord Campbell, "that the whole is one mass; that part of that mass is represented by legacies; and that what is afterwards given is given minus what has been before given, and therefore given subject to the prior gift" (*q*).

Gift of residue before legacies.

It is not essential that the legacies should be bequeathed before the gift of residue: the rule applies whether the legacies are given before or after the gift of the residue (*r*): and it applies to an additional legacy given by codicil to a legatee named in the will (*s*).

What is a residuary gift for this purpose.

In deciding whether any particular property is charged with legacies under the principle now being considered, the substance and not the form of the residuary gift is to be regarded. Thus

(*m*) *Bright* v. *Larcher*, 3 D. & J. 148.

(*n*) *Field* v. *Peckett*, 29 Bea. 568; see also *Re Woollard's Trust*, 18 Jur. 1012.

(*o*) 2 Dick. 527, followed in *Re Bawden*, [1894] 1 Ch. 693; *Re Smith*, [1899] 1 Ch. 365. See also *Brudenell* v. *Boughton*, 2 Atk. 268; *Jones* v. *Price*, 11 Sim. 557; *Bench* v. *Biles*, 4 Mad. 187; *Aubrey* v. *Middleton*, *ante*, p. 1946; *Cole* v. *Turner*, 4 Russ. 376; *Mirehouse* v. *Scaife*, 2 My. & Cr. 695; *Peacock* v. *Peacock*, 34 L. J. Ch. 315; *Francis* v. *Clemow*, Kay, 435; *Wheeler* v. *Howell*, 3 K. & J. 198; *Re Bellis's Trusts*, 5 Ch. D. 504; *Smith* v. *Butler*, 1 Jo. & Lat. 692.

(*p*) 7 H. L. C. 689, *dub.* Lord Wensleydale; *Gainsford* v. *Dunn*, L. R. 17 Eq. 405 (where on this principle pecuniary legacies were held to be appointments out of a fund the residue of which and of the personal estate were afterwards given).

(*q*) See *Gainsford* v. *Dunn*, L. R. 17 Eq. 405 (appointment under special power): *ante*, p. 808.

(*r*) *Elliott* v. *Dearsley*, 16 Ch. D. 322; *Re Grainger*, [1900] 2 Ch. 756: *Higgins* v. *Dawson*, [1902] A. C. 1; *Re Balls*, [1909] 1 Ch. 791.

(*s*) *Re Hall*, 51 L. T. 86.

CHAPTER LIII.

if a testator, after bequeathing legacies, gives "all the real and personal estate to which at my death I shall be beneficially entitled and not otherwise disposed of," this brings the case within the principle laid down in *Greville* v. *Browne* (*t*).

Property specifically described.

And even if the whole of the testator's realty is included in the residuary gift by its specific description "as my freehold houses at S. and all and singular other the residue and remainder of my estate," the testator having no other realty than the houses at S., this makes them subject to the payment of the legacies (*u*).

These cases are based on the general principle that a residuary gift may comprise property which is specifically described (*v*).

Thus, in *Bray* v. *Stevens* (*w*), where a testator bequeathed certain legacies, and then devised and bequeathed "all his freehold estates in the parishes of B., L. and R. and elsewhere in the county of C., and all the residue of his real and personal estate, money, mine shares, chattels and effects of whatsoever kind and wheresoever situate" to trustees on certain trusts applying to the whole, it was held by Bacon, V.-C., that the legacies were charged on the freehold estates in the parishes of B., L. and R. He dissented from the decision in *Castle* v. *Gillett* (*x*).

Limits of the rule.

But a gift (after legacies) of "all my real estate and all the residue of my personal estate" plainly treats the different species of estates as two masses, and does not bring the case within *Greville* v. *Browne* (*y*).

Of course the rule is not excluded by a direction to the executors (to whom there is no devise of real estate) to pay debts and legacies: such a direction is mere surplusage (*z*). But the rule is not applicable to a case where the testator first dealing exclusively with his personal estate allots certain portions of it to several objects, and then disposes of the residue of his real and personal estate. Thus in *Gyett* v. *Williams* (*a*), where a testator bequeathed his personal estate in trust to lay out a sum, "part thereof," as therein mentioned, and to invest the residue and stand possessed thereof as to one sum, "part of it," in one way, and of other sums, "other parts of it," in other

(*t*) *Re Bawden*, [1894] 1 Ch. 693; *Re Smith*, [1899] 1 Ch. 365.
(*u*) *Thorman* v. *Hilhouse*, 5 Jur. (N.S.) 563.
(*v*) See *ante*, p. 925.
(*w*) 12 Ch. D. 162.
(*x*) L. R. 16 Eq. 530.
(*y*) *Wells* v. *Row*, 48 L. J. Ch. 476; *James* v. *Jones*, 9 L. R. Ir. 489; *Re Salt*, [1895] 2 Ch. 203. Compare *Re Adams and Perry's Contract*, [1899] 1 Ch. 554, stated *ante*, p. 1952.
(*z*) *Re Brooke*, 3 Ch. D. 630.
(*a*) 2 J. & H. 429.

ways; he then gave some small pecuniary legacies *simpliciter*, and concluded with a gift of all the residue of his estate and effects whatsoever and wheresoever : it was held by Wood, V.-C. that the several sums described as parts of the personal estate were not charged on the realty, and that the small pecuniary legacies were so charged.

Legacies not charged on realty by joining realty and personalty in same gift.

And the mere joining in one devise or bequest of the real and personal estate is not of itself enough to charge legacies on real estate. In all the cases some other circumstance has been involved leading to that conclusion (*b*). And where a testator gave his whole real and personal estate to trustees and executors for the maintenance and education of his infant son and daughters, and directed that as they attained majority, his property, real and personal, should be divided as follows, *viz.*, a pecuniary legacy to his son, and his property at T. amongst his daughters, it was held that the legacy was not charged on the property at T. (*c*).

Mixed fund.

It must be remembered that, although the principle of *Greville* v. *Browne* requires that the residuary real and personal estate should be treated as one mass, it does not follow that it is to be treated as a mixed fund under the doctrine of *Roberts* v. *Walker* (*d*) so as to make the legacies payable out of the real and personal estate *pro rata* (*e*).

Annuities usually included in a charge of legacies.

It may here be observed, that, under a charge of legacies, annuities will generally be included (*f*), unless the testator manifests an intention to distinguish them (*g*), as by sometimes using both words (*h*).

Remedies of legatee

Where a testator devises land charged with a legacy, and the devisee takes possession, the legatee cannot claim rents received by the devisee; his remedy is to obtain the appointment of a receiver (*i*).

(*b*) See *Nyssen* v. *Gretton*, 2 Y. & C. 222.

(*c*) *Bentley* v. *Oldfield*, 19 Bea. 225.

(*d*) 1 R. & My. 752, *post*, p. 1979.

(*e*) *Elliott* v. *Dearsley*, 16 Ch. D. 322. The dictum of Jessel, M.R., to the contrary in *Gainsford* v. *Dunn*, L. R. 17 Eq. 405, is overruled : *Re Boards*, [1895] 1 Ch. 499.

(*f*) "Legacy" generally includes "annuity" : *Sibly* v. *Perry*, 7 Ves. 522; *Bromley* v. *Wright*, 7 Ha. 334; *Ward* v. *Grey*, 26 Bea. 485; *Mullins* v. *Smith*, 1 Dr. & Sm. 204; *Nicholson* v. *Patrickson*, 3 Giff. 209; *Gaskin* v. *Rogers*, L. R. 2 Eq. 284. *Ante*, p. 1022.

(*g*) *Shipperdson* v. *Tower*, 1 Y. & C. C. C. 441; or where the scheme of the will excludes that construction, as in *Cunningham* v. *Foot*, 3 A. C. 974.

(*h*) See *Nannock* v. *Horton*, 7 Ves. 391; *Woodhead* v. *Turner*, 4 De G. & S. 429; *Gaskin* v. *Rogers*, L. R. 2 Eq. 284. But this is not conclusive : *Heath* v. *Weston*, 3 D. M. & G. 601; *Ward* v. *Grey*, 26 Bea. 485.

(*i*) *Garfitt* v. *Allen*, 37 Ch. D. 48.

IX.—Whether a General Charge extends to Lands specifically devised.—Where a testator has manifested an intention to charge his real estate with the payment of either debts or legacies, the question sometimes arises, whether such charge extends to the specific as well as the residuary lands, or is confined to the latter.

Rule in case of legacies.

And first as to legacies. In *Spong* v. *Spong* (*j*), where a testator, after specifically devising certain lands to A and other persons, and charging his real and personal estate with his legacies, and then bequeathing some pecuniary legacies, gave the residue of his real and personal estate to A; it was held in the House of Lords that the legacies were not charged upon the lands specifically devised; for that, in construing charges of this nature, specific and residuary devises, though for many purposes governed by a common principle, were to be distinguished; especially as in the case under consideration the testator had shown such a distinction to be in his view by devising particular lands to the person whom he made residuary devisee. "By specifically devising or specifically bequeathing any part of his property," said Lord Manners, "the testator intends, as between the objects of his bounty, to separate that part of his property from the rest, and that it should not be subject to the provisions and operation of his will."

Conron v. *Conron.*

So in *Conron* v. *Conron* (*k*), where the testator by will dated in 1836, after making certain specific devises and bequests, gave some pecuniary legacies, and charged "all his real and chattel estates and property of every description," with payment thereof; and subsequently devised "all the residue of all his real and freehold estates, goods, and effects of every kind" to A in fee; it was held in the House of Lords that the charge of legacies did not extend to the specifically devised estates. "The true rule," said Lord Cranworth, "deducible from *Spong* v. *Spong*, is that a mere charge of legacies on the real and personal estate (and 'on *all* the real and personal estate' must mean exactly the same thing) does not of itself create a charge on any specific devise or bequest. I think that the rule is a very reasonable one, and is likely to be in general conformable to the intentions of testators."

Both these cases occurred under the old law. The Wills Act did not diminish the distinction between specific and residuary devises.

(*j*) 1 Y. & J. 300; 3 Bli. (N.S.) 84. But see the observations of Lord Cottenham, C., on this decision: *Mirehouse* v. *Scaife*, 2 My. & Cr., at pp. 704, 705.

(*k*) 7 H. L. C. 168; *Campbell* v. *M'Conaghey*, Ir. R. 6 Eq. 20.

In case of debts.

But in both cases legacies only were charged. The reason of the rule as stated by Lord Manners is inapplicable to a charge of debts (*l*); and where debts and legacies are charged together, the legacies, being placed by the will on an equal footing with the debts, get the benefit of the charge on the specifically devised estates (*m*).

Form of will.

According to some of the authorities the question turns on whether the charge precedes or follows the specific devise: "It seems to me to make a most marked difference whether a man begins by making a charge upon all his property, or whether he begins by making a specific devise or bequest and then charges his property, because, when he has made a specific devise or bequest, and then proceeds to charge his property, it may well be that he means 'all that property which I have not already by this my will disposed of'" (*n*). Conversely, if the testator begins by charging an annuity on all his realty and then makes specific devises, the inference is that he intends the annuity to be a charge on the specifically devised realty as well as the other (*o*).

Where a charge of legacies is effected under the rule in *Greville* v. *Browne* (*p*), and there is also a specific devise of realty, the latter is not charged with the legacies, but only the residuary realty (*q*). On the same principle (it may be presumed), where a testator made several devises and bequests; and, "charged with his debts and legacies," he devised "all other" his hereditaments to his nephews and nieces; he then by codicil specifically devised a house to his daughter, "it being his wish that she should reside therein if she should think fit"; it was held that the house was exempted from the charge of debts and legacies (*r*).

In *Wisden* v. *Wisden* (*s*) the testator, after specifically devising real property to each of his sons, directed that neither of his sons should have possession of any of the said premises "until the time that all my just debts shall be paid." It was held that this charged the debts on the properties specifically devised to the sons.

(*l*) See *e.g.*, *Harris* v. *Watkins*, Kay, 438; *Mannox* v. *Greener*, L. R. 14 Eq. 456.

(*m*) *Maskell* v. *Farrington* (*Re Emmerton's Estate*), 3 D. J. & S. 338; and see *Rowley* v. *Eyton*, 2 Mer. 128.

(*n*) *Per* Malins, V.-C., in *Mannox* v. *Greener*, L. R. 14 Eq., at p. 459; *Quain* v. *Harvey*, 5 L. R. Ir. 622.

(*o*) *Cornwall* v. *Saurin*, 17 L. R. Ir. 595.

(*p*) *Ante*, p. 1953.

(*q*) *Per* Bacon, V.-C., *Bray* v. *Stevens*, 12 Ch. D. 169. *Francis* v. *Clemow*, Kay, 435, is not *contra*; the plaintiff (legatee) claimed only against residue.

(*r*) *Wheeler* v. *Claydon*, 16 Bea. 169; *Quain* v. *Harvey*, 5 L. R. Ir. 622.

(*s*) 2 Sm. & G. 396; 5 Jur. (N.S.) 455.

CHAPTER LIII.

Where there is no residuary devise.

In *Bank of Ireland* v. *McCarthy* (*t*) the testator bequeathed pecuniary legacies, charged in the first place upon his personalty, and (if the same should be insufficient) upon his real and personal estates : he then devised to one son his lands at A, and devised to his other son, "subject as aforesaid," his lands at B, C, D and E : there was no residuary devise : it was argued on behalf of persons claiming under the devise of the lands at A that the words "subject as aforesaid" showed an intention on the part of the testator to charge the legacies only on the lands at B, C, D and E, and also that the devise of these lands was in effect residuary. It is hardly necessary to say that neither argument prevailed.

Direction to raise moneys out of the rents and profits.

X.—Whether a Direction to raise Money out of Rents and Profits authorizes a Sale or Mortgage.—Mr. Jarman continues (*u*) : "It is clear, that a devise of the *rents* and *profits* of land is equivalent to a devise of the land itself, and will carry the legal as well as beneficial interest therein (*v*); but the question which has chiefly given rise to perplexity in reference to these words is, whether a direction or power to raise money out of the *rents and profits* authorizes a sale, the doubt being, whether, in such cases, the testator or settlor, by the words 'rents and profits,' means the *annual* income only, according to their ordinary and popular signification, or uses the phrase in a more comprehensive sense, as designating the proceeds or 'profits' of the inheritance, and, therefore, as impliedly conferring a power to dispose of such inheritance.

Authorises a sale where definite time is fixed for payment.

"The doctrine on this subject has fluctuated; the early authorities leaning more to the restricted construction than the recent cases. But, it seems, that even those authorities admitted a sale, where the purpose was to pay debts and legacies (*w*), or to raise a portion by a definite period, within which it could not be raised out of the annual rents (*x*); and this rule was extended

(*t*) [1898] A. C. 181, affirming decision of C. A. Ir., *M'Carthy* v. *M'Cartie*, [1897] 1 Ir. R. 86 (on different ground).

(*u*) First ed., Vol. II, p. 534.

(*v*) *Johnson* v. *Arnold*, 1 Ves. Sen., at p. 171; *Baines* v. *Dixon*, *ib.*, at p. 42; *Doe* v. *Lakeman*, 2 B. & Ad., at p. 42; and see *ante*, p. 1264.

(*w*) *Lingon* v. *Foley*, 2 Ch. Cas. 205; *Anon.*, 1 Vern. 104; *Berry* v. *Askham*, 2 Vern. 26; *Rawlins* v. *Brotherson*, Ex. 1783, cit. 2 Ves. Jun. 480 (as to which *qu.*, the expression there being "*annual* rents and profits"). See also *Talbot* v. *Duke of Shrewsbury*, Pre. Ch. 394; *Metcalfe* v. *Hutchinson*, 1 Ch. D. 591.

(*x*) *Sheldon* v. *Dormer*, 2 Vern. 310; *Warburton* v. *Warburton*, *ib.* 420; *Jackson* v. *Farrand*, *ib.* 424; *Gibson* v. *Lord Montfort*, 1 Ves. Sen. 485; *Okeden* v. *Okeden*, 1 Atk. 550. "Some parts of Lord Hardwicke's judgment in this case [*Okeden* v. *Okeden*] are irreconcilable. He is made, in one place, to assume, that the portion was to be raised at the period of vesting, and, in another, to state the contrary. It seems difficult to support the latter hypothesis. And see *Hall* v. *Carter*, 2 Atk. 355." (Note by Mr. Jarman.) See also *Backhouse* v. *Middleton*, 1 Ch. Ca. pp. 173, 176.

by Lord Hardwicke to a case in which the portions, being payable in such manner as a third person should appoint, *might* have become payable within a definite time (*y*).

Where no definite time is fixed.

"It was held, however, in the very early cases, that, if the portion were to be raised out of the rents and profits, without any specified time of payment, it could only be raised by a gradual accumulation of the annual profits as they arose (*z*).

"But judges, in later times, looking at the inconvenience of raising a large sum of money in this manner, have inclined much to treat a trust to apply the rents and profits in raising a portion, as authorizing a sale" (*a*).

Position of text writers.

After quoting the observations of Lord Hardwicke in *Green* v. *Belchier* (*b*) and *Baines* v. *Dixon* (*c*), and those of Lord Thurlow in *Shrewsbury* v. *Shrewsbury* (*d*) and of Lord Eldon in *Bootle* v. *Blundell* (*e*) (all of which are set out in the previous editions of this work) Mr. Jarman observes: "These quotations controvert the position advanced by some respectable writers, that annual rents is the primary meaning of rents and profits; they show the rule of construction to be rather the reverse (*f*),

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(*y*) *Green* v. *Belchier*, 1 Atk. 505. See also *Allan* v. *Backhouse*, 2 V. & B. 65, stated *post*, p. 1963.

(*z*) Mr. Jarman cites in support of this proposition *Trafford* v. *Ashton*, 1 P. W. 415; *Ivy* v. *Gilbert*, 2 P. W. 13; *S. C.*, *Evelyn* v. *Evelyn*, 2 P. W. 659; *Mills* v. *Banks*, 3 P. W. 1, but *Trafford* v. *Ashton* is really a decision the other way (*post*, note (*a*)) and the other two cases are by no means conclusive. In *Ivy* v. *Gilbert* there was an express power to lease, which impliedly excluded a sale or mortgage: see *Baines* v. *Dixon*, *supra*, n. (*v*).

(*a*) The doctrine in question is much older than Mr. Jarman supposed; he seems to have overlooked the case of *Heycock* v. *Heycock*, 1 Vern. 256, which recognises the doctrine that where a sum is directed to be raised out of the rents and profits of land, and they are not sufficient to raise the amount in a convenient time, it may be raised by sale or mortgage (see also *Sheldon* v. *Dormer*, 2 Vern. 310). *Trafford* v. *Ashton*, 1 P. W. 415, was not the case of a will, but of a settlement made on marriage, and the trust was to raise portions for daughters of the marriage "as soon as conveniently may be," and it was decreed that they should be raised by sale or mortgage, apparently on the ground that the daughters were "purchasers of portions, by their mother's marriage," and that the portions were therefore in the same position as debts. *Stanhope* v. *Thacker*, Prec. Ch. 435, was a similar case.

(*b*) 1 Atk. 505.

(*c*) 1 Ves. Sen. 42.

(*d*) 1 Ves. Jun., at p. 234.

(*e*) 1 Mer., at p. 232.

(*f*) "*Vide* Mr. Cox's note to *Trafford* v. *Ashton*, 1 P. W. 418; Mr. Raithby's note to an anonymous case, 1 Vern. 104; and Mr. Belt's Suppl. to Ves. Sen. 221. Mr. Belt's observation, that Lord Hardwicke, in *Conyngham* v. *Conyngham*, 1 Ves. Sen. 522 (more fully stated by Mr. B., Suppl. 221), seems to have thought that his predecessors had gone too far in holding that money, to be raised out of rents and profits, might be raised by a sale, is quite at variance with the general tenor of his Lordship's judgments, which carried the rule in favour of a sale much farther than any of his predecessors, and may be considered to have established the present doctrine upon the subject. In the particular case referred to, it is true, his Lordship held the charge to affect the annual income only; but the will was so clear on this point, that, with all his partiality to the opposite construction, it was impossible that he could come to any other conclusion. The testator devised his plantation and lands to trustees and their heirs, in trust for payment of

General doctrine of the authorities.

and that these words are to be taken in their widest sense, namely, as authorizing a sale, unless restrained by the context (*g*); but, perhaps, it more accords with the principle of the authorities to say, that the signification of the phrase is governed wholly by the nature of the purpose for which the money is to be raised, and the general tenor of the will.

Exception where estate is treated as existing entire after raising of debts.

"If the testator or settlor manifests, by the context of the instrument, that he contemplates the identical subject, out of whose 'rents and profits' the money shall have been raised, being afterwards enjoyed by the devisees, or remaining otherwise available for the purposes of the will, it is evident that he intends the current annual income only to be applied; for by such means alone can the raising of the money be made consistent with the preservation of the entire subject of disposition (*h*).

"So, if the testator treats the raising of the money as a process requiring time, and defers a devisee's perception of the rents or an annuitant's receipt of his annuity out of them until such purpose shall have been accomplished, the irresistible inference is, that the testator intends the money to be raised by a gradual appropriation of the rents and profits as they arise, and not in a mass by sale or mortgage (*i*).

Effect where "residue" of rents and profits is given.

"Such also is the effect when the testator proceeds to direct that the *residue* of the rents and profits (after answering the charge) shall be paid over to the devisee for life; especially if he has included annuities in the charge, these being, from their nature, evidently intended to come out of the annual income (*k*). The latter circumstance, however, was, by Lord Hardwicke, considered to be inconclusive in *Okeden* v. *Okeden* (*l*), where

his funeral expenses, debts, and legacies, and to keep the plantation in good repair, and to keep the negroes, with their increase, and the stock thereon, in as good a condition as they were at his death, out of the rents and profits; and he directed that the produce of his estate should be shipped as C., one of his two trustees, should direct, until his (testator's) funeral charges, debts and legacies should be paid; and he gave C. power out of the said produce, as the same should be remitted, to pay his debts and legacies. Lord Hardwicke thought himself not warranted to decree a sale; it happened, he said, to be sometimes attended with inconvenience, as in *Ivy* v. *Gilbert*, 2 P. W. 13; but he could not go further unless there was some other right of incumbrance." (Note by Mr. Jarman.)

(*g*) "You must find on the face of the will a clear restriction of the general meaning of words directing you to raise a gross sum payable immediately, or at a day fixed, out of rents and profits; and the words are not otherwise to be read as annual rents and profits": *per* Jessel, M.R., in *Metcalfe* v. *Hutchinson*, 1 Ch. D., at p. 598, cited and commented on by Stirling, J., in *Re Green*, 40 Ch. D., at p. 614.

(*h*) See *Wilson* v. *Halliley*, 1 R. & My. 590.

(*i*) *Small* v. *Wing*, 5 B. P. C. Toml. 66. Mr. Jarman's statement of this case is omitted.

(*k*) *Heneage* v. *Lord Andover*, 3 Y. & J. 360, cited by Wood, V.-C., in *Forbes* v. *Richardson*, 11 Hare, at p. 359. See also *Taylor* v. *Emerson*, 2 Con. & Law. 558, where, however, the words were "out of the interest proceeds or annual rents." See Chap. XXXI, *ante*, pp. 1111 *seq.*

(*l*) 1 Atk. 550.

the trustee of a term for years was to receive the rents and profits, and apply part thereof for raising £5,000 for A, if he should live to attain twenty-five, and to pay certain charges; and though the other charges were clearly of a nature which must have been intended to come out of the annual profits (being for the maintenance of infants (*m*), and making repairs, and to pay an annuity), yet his Lordship was of opinion, that a sale of the inheritance might be decreed for raising the portion, if the rents during the minority of the devisee of the land, during which the trustees took an estate, did not amount to the sum (*n*).

Rule where some of the prescribed purposes require a sale, and some not.

"Where some of the purposes for which the money is to be raised require a sale, and others do not, there might seem to be ground to contend, that, as the testator has not drawn any line of distinction between them in regard to the mode of raising the money, the whole is raisable in one manner. In the case of *Wilson* v. *Halliley* (*o*), however, where debts and legacies were to be raised out of rents and profits, Sir J. Leach, M.R., treated it as clear, that, though a sale might have been effected, if necessary, for the purpose of liquidating the debts, the conclusion from the whole will (which was very long) was, that the legacies, though payable at definite periods, were raisable out of the annual rents only. He relied much on the circumstance that the estates (the rents and profits of which were made applicable to this purpose) were afterwards devised 'subject to the receipt of the rents and profits thereof by my said trustees and executors for the purposes aforesaid.'"

Clear context required to negative sale for debts.

Referring to this case, Sir G. Jessel, M.R., said (*p*), "Sir J. Leach read the words 'rents and profits' differently as applied to the debts and as applied to a gross sum which the testator directed to be raised by way of bounty, meaning that as the debts must be paid the testator never could intend that the creditors were to wait." And this distinction in regard to debts he thought would be stronger in the case of a modern will, where the creditors can resort to the real estate as a matter of right, and that it would be a very strange intention to impute to a testator that he should by his will intend to delay the creditor, having no legal right so to do. The context might show that he did so intend; but considering the absurdity of the intention, the context must be plain.

(*m*) But in *Torre* v. *Browne*, 5 H. L. C. 555, where a term was limited to provide £200 annually for the maintenance of the testator's children, it was held that the whole interest in the term was charged.

(*n*) The question how the deficiency should be raised was reserved for further consideration.

(*o*) 1 R. & My. 590.

(*p*) *Metcalfe* v. *Hutchinson*, 1 Ch. D. 591.

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Sale notwithstanding gift of "remainder of rents and profits."

In *Metcalfe* v. *Hutchinson* (*q*), the testator directed his debts to be paid out of the rents and profits of his real and personal estate, and after the debts were paid that the *remainder* of the rents and profits should be paid for life, with remainder over in fee; and it was held by Sir G. Jessel that the words directing payment of the remainder were not sufficient to exclude the general rule that a direction to pay out of rents and profits meant *prima facie* out of the estate. Here "rents and profits" necessarily meant the corpus in the gift of the remainder.

To exclude the rule where, subject to a charge of debts or of gross sums, the estate is devised for life, with remainder over, involves another improbability, *viz.*, that the testator intended to throw the whole burden on the tenant for life. This point was glanced at in *Harper* v. *Munday* (*r*). But aggrandizement of the estate is not infrequently the primary object of a testator to which the interests of the immediate devisee are postponed (*s*). This is strongly indicated where accumulation of the rents is ordered as the mode of raising the debts (*t*).

In *Re Webster* (*u*) a testatrix directed that the sale of her realty should be postponed for five years and that until sale the income should be applied towards the payment off of certain debts, and that after the sale the proceeds thereof should be divided between certain beneficiaries. It became necessary to sell part of the property before the end of the period in order to pay off the debts. It was held that the persons entitled to the reversion in five years were entitled to be recouped out of the rents and profits of the unsold property during the remainder of the five years.

Direction to raise out of the rents and profits, *or* by sale or mortgage.

Mr. Jarman continues (*x*), "Where the direction is to raise out of the rents and profits, *or* by sale or mortgage, it is obvious that these words (being evidently used in contradistinction) cannot mean the same thing; rents and profits, therefore, must import annual rents and profits; and if, in such a case, the charges to be raised by these respective modes are of two kinds,

(*q*) 1 Ch. D. 591.

(*r*) 7 D. M. & G. pp. 369, 373, 375. See also *Lord Londesborough* v. *Somerville*, 19 Bea. 295, where the charge was of legacies, to be paid within three months.

(*s*) As, where the testator has no immediate descendants, and the first takers are collaterals: *Lord Lovat* v. *Duchess of Leeds*, 2 Dr. & Sm. 62: the intention was express, "by rents and profits but not by sale or mortgage," and it was held that timber-money was not charged, *ib*. 75.

(*t*) See *Tewart* v. *Lawson*, L. R. 18 Eq. pp. 490, 494. But if the debts are in fact paid out of the corpus, the tenant for life is not bound to recoup the corpus: *Re Green*, 40 Ch. D. 610. See *ante*, p. 1177.

(*u*) 54 Sol. J. 602.

(*x*) First ed., Vol. II, p. 540.

one annual, and the other in gross, the words will be distributed, the annual charges being raisable out of the annual rents, and the sums in gross by sale or mortgage (*y*).

Direction to raise by lease.

"Of course, where the direction is to raise a sum of money by leases for lives or years *at the old rent*, the intention to confine the charge to annual rents is beyond all doubt" (*z*).

So where portions are to be raised by making a lease, which is directed to cease as soon as the portions are raised; since, if they were raised by sale or mortgage, the term must continue for the benefit of the purchaser or mortgagee (*a*). And in a settlement which contained a charge in these terms, and another to be effected by "lease, mortgage, or otherwise," a third clause, giving a power to raise portions by lease (without more), was held to be confined by the context to annual rents (*b*).

As to raising fines for renewal of leases.

Mr. Jarman continues: "Provisions for the renewal of leases out of the rents and profits often give rise to the point under consideration. In such cases, if the terms of renewal are such that the fine may be called for suddenly, so as to render the raising of it out of the annual rents impossible or inconvenient, a strong argument is afforded for holding the words to authorize a sale or mortgage. Indeed, this construction prevailed in a modern case, in spite of some expressions in the context rather strongly pointing the other way.

Expenses of renewed lease to be paid out of rents and profits.

"Thus, in the case of *Allan* v. *Backhouse* (*c*), where the testator, after devising certain leasehold estates *held upon bishop's leases for lives*, and all other his real estate, to certain uses, directed the renewal of the leaseholds, and that the expenses should be raised *out of the rents and profits* of the leasehold premises, or of any part of the freehold estates; and he declared that the renewed leases should be held upon the same trusts as were declared of the freehold and copyhold estates, *to the end that they might be enjoyed therewith so long as might be*; Sir T. Plumer, V.-C., held, that, as the purpose for which the money was to be raised out of the rents and profits might require it suddenly (for the lessor could not be expected to wait for the gradual payment out of the rents), and as there was nothing in the will to give to these words the abridged sense of annual rents and profits, except the purpose

Sale decreed.

(*y*) *Playters* v. *Abbott*, 2 My. & K. 97; see also *Ridout* v. *Earl of Plymouth*, 2 Atk. 104 ("by perception of the rents, or by leasing or mortgaging"); *Marker* v. *Kekewich*, 8 Ha. 291; *Re Marquess of Bute*, 27 Ch. D. 196 ("by mortgaging or otherwise disposing of . . . or out of the rents, issues and profits"). See, however, Davidson, Conv. iii, 450, n.

(*z*) *Ivy* v. *Gilbert*, 2 P. W. 13; Pre. Ch. 583. See also *Ridout* v. *Earl of Plymouth*, 2 Atk. 104; *Mills* v. *Banks*, 3 P. W. 1.

(*a*) *Evelyn* v. *Evelyn*, 2 P. W. 659, 670.

(*b*) *Ib.*

(*c*) 2 V. & B. 65. See *Garmstone* v. *Gaunt*, 1 Coll. 577.

to preserve the estate entire (which his Honor thought warranted the sacrificing of part for the preservation of the remainder), the money might be raised by sale or mortgage" (*d*). This decision was affirmed by Lord Eldon (*e*).

Where other words than "rents and profits" are used.

The early Judges seem to have thought themselves justified in laying down the general rule now under discussion, by treating the annual rents as "ordinary profits," and the proceeds of a sale or mortgage as "extraordinary profits" (*f*). Consequently, if the phrase used by the testator is not simply "rents and profits," the general rule does not necessarily apply. This distinction seems to have influenced the decision in *Re Green* (*g*), where the words "rents, dividends, and annual proceeds" were treated as equivalent to "annual rents, dividends, and proceeds."

Annual rents and profits.

A charge on corpus is, of course, excluded where the expression is "annual rents and profits" (*h*).

Implied prohibition of mortgage.

Where the testator expressly says that the charges are to be raised out of rents and profits, but not by sale, this would, as a general rule, also prohibit a mortgage or other virtual alienation of the estate (*i*).

New law

Perpetually renewable leases have now been converted into long terms: see the fifteenth Schedule to the Law of Property Act, 1922.

(*d*) This is a very compressed statement of the grounds of his Honor's judgment, in which he reviewed the principal authorities.

"As to the mode of contribution towards renewal-fines by tenant for life and remainderman, see 9 Jarm. Convey. 347, and to the authorities there cited add *Shaftesbury* v. *Duke of Marlborough*, 3 L. J. (N.S.) 30 [2 My. & K. 111]; *Greenwood* v. *Evans*, 4 Bea. 44. In the former case, the fact of the testator having made a provision for raising the fine was allowed an influence upon the question of contribution to which it has not commonly been considered as entitled." (Note by Mr. Jarman.) See also *Hudleston* v. *Whelpdale*, 9 Hare, 775; *Greenwood* v. *Evans*, 4 Bea. 44; *Mortimer* v. *Watts*, 14 Bea. 616, and *ante*, p. 1178.

(*e*) Jac. 631.

(*f*) See *Stanhope* v. *Thacker*, Prec. Ch. 435.

(*g*) 40 Ch. D. 610, where *Collier* v. *Walters*, L. R. 17 Eq. 252 ("rents, issues, and yearly profits") is referred to.

(*h*) *Marsh* v. *Marsh*, 2 Jur. (N.S.) 348; *Forbes* v. *Richardson*, 11 Ha. 354; *Scott* v. *Clements*, 8 Ir. Ch. R. 1.

(*i*) *Bennett* v. *Wyndham*, 23 Bea. 521.

CHAPTER LIV.

ADMINISTRATION OF ASSETS, EXONERATION OF DEVISED LANDS, EXEMPTION OF PERSONALTY, MARSHALLING OF ASSETS, ETC.

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Foreign assets and foreign creditors.

I.—Preliminary.—This chapter deals only with administration under the law of England. The general principle, so far as the payment of debts is concerned, is that administration is regulated by the *lex fori*: "If a man dies domiciled in England, possessing assets in France, the French assets must be collected in France, and distributed according to the law of France. . . . But if it should happen that a man died domiciled in France, leaving assets in England, those assets can only be collected

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under an English grant of administration, and being so collected must be distributed according to the law of England" (*a*).

Foreign property and foreign beneficiaries.

In ascertaining the rights of the beneficiaries under a will, the general principle seems to be that in giving effect to the provisions of the will so far as it deals with moveable property, regard must be had to the law of the testator's domicil, and so far as it deals with immoveable property, regard must be had to the *lex loci rei sitae* (*b*).

Administration to attorney of foreigner.

Where administration is taken out in England by the attorney of a foreign principal in respect of English assets, the question arises whether the attorney administrator can pay over the surplus to his principal. The cases, which are somewhat conflicting, were considered in *Re Achillopoulos* (*c*), and it was held that if by the law of the domicil it was the duty of the foreign principal to pay the foreign debts, the attorney administrator might pay over the surplus to the foreign principal.

As to where an executor becomes a trustee see *Re Claremont* (*d*).

The rules laid down by law for the administration of the estates of deceased persons do not fall within the scope of this work, but as a testator has the power of modifying these rules —not, of course, so as to affect the rights of creditors, but so as to affect the rights of persons claiming under him as volunteers —it is necessary shortly to refer to them.

Funeral expenses.

An executor is bound to apply the personal estate of his testator, first, in payment of the funeral expenses, next of the testamentary expenses, and then of the debts.

It is submitted that this order is not altered by the First Part of the First Schedule to the Administration of Estates Act, 1925, which provides that in the case of insolvent estates the funeral and testamentary and administration expenses have priority. When the estate is solvent, the real and personal estate is applicable towards the discharge of the funeral, testa-

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(*a*) *Per* Pearson, J., in *Re Klœbe*, 28 Ch. D., at p. 177. See *Pardo* v. *Bingham*, L. R. 6 Eq. 485. *Preston* v. *Melville*, 8 Cl. & F. 1; *Cook* v. *Gregson*, 2 Dr. 286; *Blackwood* v. *R.*, 8 A. C. 82; *Ewing* v. *Orr Ewing*, 10 A. C. 453; *R.* v. *Lovitt*, [1912] A. C. 212 (New Brunswick Succession Duty); *Hanson* v. *Walker*, 7 L. J. (o.s.) Ch. 135 (debts charged on land in foreign country).

(*b*) See *ante*, Chap. I. *Enohin* v. *Wylie*, 10 H. L. C. 1; *Eames* v. *Hacon*, 16 Ch. D. 407, 18 Ch. D. 347, and cases there cited; *Ewing* v. *Orr Ewing*, 9 A. C. 34; 10 A. C. 453; *Re Trufort*, 36 Ch. D. 600; *Harrison* v. *Harrison*, L. R. 8 Ch. 342; *Re Hewit*, [1891] 3 Ch. 568. As to the law by which questions of legitimacy are goverend, see *ante*, p. 1722.

(*c*) [1928] 1 Ch. 432; in addition to the cases there cited see also *Re Lorillard*, [1922] 2 Ch. 638.

(*d*) [1923] 2 K. B. 718; *Pitt* v. *Mann*, 44 T. L. R. 371; *Re Yerburgh*, [1928] W. N. 208.

mentary and administration expenses in the order mentioned below in Section III.

No more is allowed for the funeral than is necessary having regard to the degree and condition of life of the deceased (*e*). Funeral expenses do not include mourning (*f*), or the cost of a tombstone (*g*).

Tombstone.

Testamentary expenses.

Testamentary expenses are expenses incident to the proper performance of the duty of an executor (*h*) in connection with the personal estate (*i*), including the estate duty on personal property (*k*), the costs of proving the will, of obtaining legal advice as to the distribution of the estate (*l*), the expenses of ascertaining the persons entitled to a legacy or specific fund (*m*), and the expenses of getting in property abroad (*n*). In *Sharp* v. *Lush* (*o*), Jessel, M.R., said that testamentary expenses included expenses incurred by an executor in taking care of property specifically bequeathed until he assented to the bequest, but in *Re Pearce* (*p*) (where *Sharp* v. *Lush* was not cited), Eve, J., held that when the executor assents to a specific bequest, the assent relates back to the testator's death, and that the expenses of preserving the property in the meantime are payable by the legatee. This seems the correct principle.

Cost of packing.

As to the cost of packing and delivering specific legacies, the law is not very clear. See the cases in the footnote (*q*).

Public Trustee.

The income fee of the Public Trustee is not an administration expense (*r*).

Where duty not payable by executors.

If a legacy is bequeathed wholly or partly out of the proceeds of real estate, the duty on the whole or the part, as the case

(*e*) *Hancock* v. *Podmore*, 1 B. & Ad., at p. 264; *Stag* v. *Punter*, 3 Atk. 119.

(*f*) *Johnson* v. *Baker*, 2 C. & P. 207.

(*g*) *Bridge* v. *Brown*, 2 Y. & C. C. C. 181; but as to an insurance for funeral expenses, see *Goldstein* v. *Salvation Army Assurance Society*, [1917] 2 K. B. 291.

(*h*) *Sharp* v. *Lush*, 10 Ch. D. 468.

(*i*) *Re Middleton*, 19 Ch. D. 552.

(*k*) But not property appointed under a general power: *O'Grady* v. *Wilmot*, [1916] 2 A. C. 231. If the residuary personal estate is insufficient to pay the estate duty on the specifically bequeathed personalty, the deficiency must be paid out of the undisposed property in exoneration of the specifically bequeathed personalty: *Re Pullen*, [1910] 1 Ch. 564, distinguishing *Shepherd* v. *Beetham*, 6 Ch. D. 597 (probate duty).

(*l*) *Sharp* v. *Lush*, 10 Ch. D. 468.

(*m*) *Re Baumgarten*, 82 L. T. 711; *Re Vincent*, [1909] 1 Ch. 810. As to costs relating to specific legatees, see *Barton* v. *Cooke*, 5 Ves. 461.

(*n*) *Peter* v. *Stirling*, 10 Ch. D. 279; *Re Maurice*, 75 L. T. 415.

(*o*) *Supra*.

(*p*) [1909] 1 Ch. 819.

(*q*) *Re Hewett*, 65 Sol. J. 116; *Re Scott*, [1915] 1 Ch. at p. 610; *Re Sivewright*, 67 Sol. J. 168; and *Re Leach*, [1923] 1 Ch. 161. In the last two cases the estate was insufficient to pay the pecuniary legacies in full.

(*r*) *Re Bentley*, [1914] 2 Ch. 456; as to the withdrawal fee on distributing a trust fund, see *Re Hicklin*, [1917] 2 Ch. 278.

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may be, is not payable by the executors, and is, therefore, not a testamentary expense (*s*).

Administration suit.

The costs of an administration suit, or of proceedings to ascertain the construction of the testator's will, even on a point concerning only a specific fund, so far as the proceedings relate to the personal estate, are testamentary expenses (*t*). But any costs exclusively occasioned by the administration of the real estate are thrown upon the real estate (*u*). The Land Transfer Act, 1897, made no difference in this respect. Consequently, a direction by a testator that his testamentary expenses shall be paid out of his personal estate does not throw on it costs occasioned by the real estate (*x*).

Probate costs.

How far the costs of an action in the Probate Court are testamentary expenses does not seem satisfactorily settled. In *Brown* v. *Burdett* (*y*), costs incurred by the co-heiresses of a testatrix in disputing the validity of the will—the proceedings being compromised on the terms of their costs being paid out of the estate—were held by Bacon, V.-C., to be testamentary expenses. In *Re Prince* (*z*), the widow of a testator brought an action in the Probate Division impeaching the validity of the will; the Court pronounced in favour of the will and ordered the costs of both parties to be paid out of the estate; it was held in the Chancery Division that the executor's costs in the probate action were testamentary expenses, but that the widow's were not. The Probate Division has no power to order costs of proceedings in that Division to be paid in priority to or *pari passu* with the ordinary costs of administration (*a*).

Probate costs payable out of real estate.

Before the Land Transfer Act, 1897, the Probate Division had no jurisdiction over real estate, and consequently if the

(*s*) *Re Countess of Orford*, [1896] 1 Ch. 257; *Berry* v. *Gaukroger*, [1903] 2 Ch. 116; *Re Spencer Cooper*, [1908] 1 Ch. 130. As to *Berry* v. *Gaukroger*, see the note to *Re Charlesworth's Trusts*, [1912] 1 Ch., at p. 332.

(*t*) *Miles* v. *Harrison*, L. R. 9 Ch. 316; *Morrell* v. *Fisher*, 4 De G. & S. 422; *Re Young*, 44 L. T. 499; *Harloe* v. *Harloe*, L. R. 20 Eq. 471; *Penny* v. *Penny*, 11 Ch. D. 440; *Re Groom*, [1897] 2 Ch. 407; *Re Vincent*, [1909] 1 Ch. 810; *Re Hall Dare*, [1916] 1 Ch. 272; *Re Fletcher*, 62 Sol. J. 740 (devise). As to costs in a creditor's administration action, see *Re Roby*, 60 Sol. J. 291; *Bell* v. *Butterly*, [1911] 1 Ir. R. 312. But see *Re Towry's Settled Estate*, 41 Ch. D. 64; *Re Biel's Estate*, L. R. 16 Eq. 577. If the testator creates a special fund for payment of testamentary expenses the executor need not retain it unless the institution of administration proceedings is probable: *Re Cope*, 36 L. T. 437.

(*u*) *Patching* v. *Barnett*, 51 L. J. Ch. 74; [1907] 2 Ch. 154 n.; *Re Middleton*, 19 Ch. D. 552; *Re Copland*, 44 W. R. 94; *Re Roper*, 45 Ch. D. 126. Older authorities to the contrary, such as *Browne* v. *Groombridge*, 4 Madd. 495; *Ripley* v. *Moysey*, 1 Kee. 578; *Stringer* v. *Harper*, 26 Bea. 585; *Pickford* v. *Brown*, 2 K. & J. 426, seem to be overruled.

(*x*) *Re Betts*, [1907] 2 Ch. 149, following *Re Jones*, [1902] 1 Ch. 92.

(*y*) 48 L. T. 753.

(*z*) [1898] 2 Ch. 225; *Re Price*, 31 Ch. D. 485.

(*a*) *Major* v. *Major*, 2 Dr. 281; *Re Mayhew*, 5 Ch. D. 596.

Court ordered the costs of a probate action to be paid "out of the estate," that meant out of the personal estate (*b*). But in the case of a person dying since 1897, his "estate" includes his realty, and consequently costs payable "out of the estate" are payable out of the real as well as the personal estate. If the order makes no distinction between the various portions of the estate they are payable out of the entirety in due order of administration (*c*).

Intestacy.

Where a testator provides for the payment of the "testamentary expenses" of another person, who dies intestate, the provision applies to the administration of that person's estate, including the expenses of obtaining letters of administration (*d*).

Executorship expenses.

"Executorship expenses" are the same as testamentary expenses (*e*).

II.—Insolvent Estates.—If a testator dies insolvent, it is evident that the provisions of his will are inoperative and that the administration of his assets forms no part of the law of wills; but it may be convenient to state quite shortly the present law.

The law before 1926.

Before 1926 there were three different rules applicable to the administration of insolvent estates according to whether the estate was being administered out of Court, or by the Court, or in bankruptcy. The administration out of Court was a complicated affair as there was an order of debts payable out of legal assets, and the distinction between legal and equitable assets was not easy (*f*). These rules are stated in the last edition of this work. Section 34, sub-section 1 of the Administration of Estates Act, 1925, provides that where the estate of a deceased person is insolvent his real and personal estate shall be administered in accordance with the rules set out in Part I. of the First Schedule to the Act. This would seem to lay down one set of rules in place of the previous three sets, but as will be seen later this simplification has not been allowed to stand and there are now two ways of administering an insolvent estate.

The present law.

The present law, which came into force on January 1, 1926, is contained in the Administration of Estates Act, 1925. Section 32 provides that the real and personal estate (including

(*b*) *Re Shaw*, [1894] 3 Ch. 615. (*c*) *Re Vickerstaff*, [1906] 1 Ch. 762.
(*d*) *Re Clemow*, [1900] 2 Ch. 182.
(*e*) *Sharp* v. *Lush*, 10 Ch. D. 468. See also *Brougham* v. *Lord W. Poulett*, 19 Bea. 199 ("expenses of proving my will and the execution of the trusts hereof"); *Alsop* v. *Bell*, 24 Bea. 451; *Webb* v. *De Beauvoisin*, 31 Bea. 573 ("testamentary and other expenses under this my will"); *Coventry* v. *Coventry*, 2 Dr. & Sm. 470 ("testamentary and legal expenses"). In *Stringer* v. *Harper*, 26 Bea. 585, the testator exempted the personal estate from debts.
(*f*) The Court of Appeal did not understand it in *Re Hadley*, [1909] 1 Ch. 20, but the House of Lords re-established the true principle in *O'Grady* v. *Wilmot*, [1916] 2 A. C. 231.

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property appointed under a general power) are assets for the payment of the debts and liabilities of the deceased. When the estate is insolvent, it is administered in accordance with the following rules (*g*) :—" (1) The funeral, testamentary and administration expenses have priority; (2) Subject as aforesaid, the same rules shall prevail and be observed as to the respective rights of secured and unsecured creditors and as to debts and liabilities provable and as to the valuation of annuities and future and contingent liabilities respectively, and as to the priorities of debts and liabilities as may be in force for the time being under the law of bankruptcy with respect to the assets of persons adjudged bankrupt " (*h*).

Rules for insolvent estates.

Solvency.

Solvency is a question of fact (*i*); an estate is insolvent if the assets are insufficient to pay the costs of an administration action, though solvent at the time of death (*k*).

Debts provable in bankruptcy.

The rules as to debts provable in bankruptcy are (*l*) :— (1) Demands in the nature of unliquidated damages arising otherwise than by reason of a contract, promise, or breach of trust shall not be provable in bankruptcy. (2) A person having notice of any act of bankruptcy available against the debtor shall not prove under the order for any debt or liability contracted by the debtor subsequently to the date of his so having notice. (3) Save as aforesaid, all debts and liabilities present or future, certain or contingent, to which the debtor is subject at the date of the receiving order, or to which he may become subject before his discharge by reason of any obligation incurred before the date of the receiving order, shall be deemed to be debts provable in the bankruptcy.

Secured creditors.

If a secured creditor realises his security he may prove for the balance due to him, after deducting the net amount realised. If a secured creditor surrenders his security for the general benefit of the creditors he may prove for the whole debt. If a secured creditor does not either realise or surrender his security, he shall, before ranking for dividend, state in his proof the particulars of his security, the date when it was given, and the value at which he assesses it, and shall be entitled to receive a dividend only in respect of the balance due to him after deducting the value so assessed (*m*).

(*g*) Section 34 and Part I of the First Schedule to the Administration of Estates Act, 1925. As to the funeral of a bankrupt, see *Re Walker*, [1929] 1 Ch. 647.

(*h*) See *Re Whitaker*, [1904] 1 Ch. 299 (interest on debts); *Re Whitaker*, [1901] 1 Ch. 9 (voluntary creditors); and *McCausland* v. *O'Callaghan*, [1904] 1 Ir. R. 376 (judgment creditors).

(*i*) *Re Pink*, [1927] 1 Ch. 237 (annuitant).

(*k*) *Re Leng*, [1895] 1 Ch. 652.

(*l*) Section 30 of the Bankruptcy Act, 1914.

(*m*) Second Schedule to the Bankruptcy Act, 1914.

Pre-preferential debts.

Certain debts have priority. The pre-preferential debts (*n*) are money due to a friendly society from its officer (*o*) and moneys due to a Trustee Savings Bank from its officer (*p*), and, it would seem, certain debts of persons dying subject to military law (*q*).

Preferred debts.

The preferred debts (*r*) are : (a) all parochial or other local rates (*s*) due at the date of the death and having become due and payable within twelve months next before that date, and all assessed taxes, land tax, property or income tax assessed on the deceased up to the fifth day of April next before the death and not exceeding in the whole one year's assessment (*t*); (b) all wages or salary (*u*) of any clerk or servant in respect of services rendered to the deceased during five months before the death not exceeding fifty pounds; (c) all wages of any labourer or workman (*v*) not exceeding twenty pounds, whether payable for time or piece work in respect of services rendered to the deceased two months before his death, subject to a provision for apportionment when part is to be paid as a lump sum at the end of the year of hiring; (d) all amounts due in respect of compensation under the Workmen's Compensation Act, 1925 (*x*); (e) contributions payable under the Unemployment Insurance Act, 1920, in respect of employed persons during four months before the death (*y*). These preferred debts rank *pari passu*.

Deferred debts.

There are also certain deferred debts. These are money due to persons who have lent money or sold a goodwill in consideration of shares in the profits of a business (*z*), loans by the surviving wife or husband of the deceased for purposes of trade (*a*), and certain claims under covenants to settle after-acquired property (*b*).

(*n*) Bankruptcy Act, 1914, s. 33, sub-s. 9.

(*o*) Friendly Societies Act, 1896, s. 35.

(*p*) Trustee Savings Banks Act, 1869, s. 14. (*q*) Regimental Debts Act, 1893

(*r*) Bankruptcy Act, 1914, s. 33, sub-ss. 1 and 5; see *Re Heywood*, [1897] 2 Ch. 593.

(*s*) *E.g.*, drainage rate : *Re Ellwood*, [1917] 1 Ch. 455; see also *Re Arranging Debtor*, [1921] 2 Ir. R. 1 (water rate).

(*t*) The Crown, it is submitted, has no other priority : *Food Controller* v. *Cook*, [1923] A. C. 647 (company in liquidation), which appears in effect to overrule *Re Laycock*, [1919] 1 Ch. 241; *Re Lang Propeller, Ltd.*, [1927] 1 Ch. 120 (income tax deducted by a mortgagor).

(*u*) Including wages or salary earned wholly or in part by way of commission (Bankruptcy (Amendment) Act, 1926, s. 2).

(*v*) See *Re General Radio Company, Ltd.*, [1929] W. N. 172.

(*x*) Section 7, subject to the provisions of that section when the employer has insured against the liability.

(*y*) Section 26, sub-section 4; amending section 33, sub-section 1 (e) of the Bankruptcy Act, 1914.

(*z*) Partnership Act, 1890, s. 3; Bankruptcy Act, 1914, s. 33, sub-s. 9.

(*a*) Bankruptcy Act, 1914, s. 36; *Re Leng*, [1895] 1 Ch. 652; but where a wife accepts a bond to secure an annuity in lieu of the money lent she can claim in competition with the husband's other creditors : *Re Slade*, [1921] 1 Ch. 160.

(*b*) *Ib.*, section 42; *Re Bulteel's Settlement*, [1917] 1 Ch. 251.

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Subject to the above, all debts which would be provable in bankruptcy rank *pari passu* (*c*).

Administration in bankruptcy.

There is a second method of administering an insolvent estate, namely, under section 130 of the Bankruptcy Act, 1914. This section was repealed but was reinstated by the Expiring Laws Continuance Act, 1925. Even after there has been a judgment for administration in the Chancery Division, there may be an order for transfer to the Bankruptcy Court (*d*).

"It is settled that the rules in bankruptcy which increase a bankrupt's assets, *e.g.*, the reputed ownership claim, the fraudulent preference claim, and the sections which defeat certain settlements and executions do not apply to the administration in Chancery of the assets of a deceased person" (*e*).

From this statement it might be supposed that the rules in bankruptcy which increase a bankrupt's assets applied to administration under section 130 of the Bankruptcy Act, 1914, but this does not seem to be the case; and, apart from the right of disclaimer which cannot be exercised in Chancery administration (*f*), but can be in an administration in bankruptcy (*g*), it seems that the same rules apply in administering an insolvent estate in the chancery division as in bankruptcy. In the course of his judgment, which was affirmed by the Court of Appeal, Cave, J., in *Re Gould* (*h*), went through the relevant sections of the Bankruptcy Act, 1883, all of which have corresponding sections in the Bankruptcy Act, 1914, to see whether they applied when the administration is in bankruptcy, and he could not see how the sections which dealt with the doctrine of reputed ownership, the restriction of rights of creditors under execution, the avoidance of voluntary settlements and fraudulent preference could apply. The Court has not power to administer the property of third persons as part of the estate of the deceased insolvent debtor.

An order under section 130 of the Bankruptcy Act, 1914, does not deprive an executor of his right of retainer over assets he has got in (*i*), nor does it deprive an execution creditor of his rights (*k*).

(*c*) Bankruptcy Act, 1914, s. 33, sub-s. 7. See *Re Whitaker*, [1901] 1 Ch., at p. 12.

(*d*) *Re Tarr*, 57 Sol. J. 60. Section 66 of the Bankruptcy Act, 1914, does not apply to an administration in Chancery: *Re Wells*, [1929] 2 Ch. 269.

(*e*) *Per* Lindley, L.J., in *Re Leng*, [1895] 1 Ch., at p. 655.

(*f*) *Re Kitson*, [1911] 2 K. B., at p. 113.

(*g*) *Re Mellison*, [1906] 2 K. B. 68.

(*h*) 19 Q. B. D. 92.

(*i*) *Re Rhodes* [1899] 2 Q. B. 347; *Re Broad*, 105 L. T. 719; as to retained, see *post*, p. 1973.

(*k*) *Hasluck* v. *Clark*, [1899] 1 Q. B. 699.

Bastardy order.

Arrears and future payment under a bastardy order cannot be claimed against the deceased's estate (*l*).

Committee of lunatic.

As to the costs of the committee of a lunatic who dies insolvent, see the Irish case of *Re P.* (*m*).

Preference and retainer.

Preference and Retainer. The executor could pay one creditor in preference to another of equal degree out of legal assets and could retain a debt due to himself out of legal assets in preference to other creditors of equal degree. The modern form of administration bond granted to a creditor precludes him from preferring himself (*n*). The distinction between legal and equitable assets has now been abolished; but section 34, subsection 2 of the Administration of Estates Act, 1925, expressly provides that the right of retainer of a personal representative and his right to prefer creditors may be exercised in respect of all assets of the deceased, but the right of retainer shall only apply to debts owing to the personal representative in his own right whether solely or jointly with another person (*o*). The right of retainer applies to that which the executor has in his hands or what has been paid into Court while he was executor, and which but for that payment would have come into his hands (*p*). An executor may advance money to the estate and make preferential payments to creditors and then recoup himself out of assets which subsequently come into his hands (*q*). An executor may exercise his right of retainer in respect of a statute-barred debt (*r*); but he cannot retain out of specifically bequeathed property (*s*). Before an executor pays a debt for which he is liable as surety for the testator, there is no debt in existence in respect of which he can exercise his right of retainer (*t*).

An executor can retain the whole of his testator's chattels for the payment of a debt due to him from his testator. When the chattels are realised, the balance (if any) goes to the other creditors (*tt*).

(*l*) *Re Harrington*, [1908] 2 Ch. 687; *secus* as to alimony if the estate is solvent; *Re Stillwell*, [1916] 1 Ch. 365; *Firman* v. *Royal*, [1925] 1 K. B. 681.

(*m*) [1926] Ir. R. 422.

(*n*) *Re Duchess of Sutherland*, [1914] 2 Ch., at p. 725; but he can prefer one creditor to another (*Re Bilham*, [1901] 2 Ch. 52).

(*o*) See *Re Benett*, [1906] 1 Ch. 216, and *Re Funnell*, 107 L. T. 145.

(*p*) *Re Compton*, 30 Ch. D., at p. 191; *Re Rhoades*, [1899] 2 Q. B. 347; See *Cherry* v. *Boultbee*, 4 My. & C. 442, 447.

(*q*) *Re Jones*, [1914] 1 Ch. 742.

(*r*) *Trevor* v. *Hutchins*, [1896] 1 Ch. 844; *Stahlschmidt* v. *Lett*, 1 Sm. & G. 415; *Hill* v. *Walker*, 4 K. & J. 166; *Clinton* v. *Brophy*, 10 Ir. Eq. R. 139.

(*s*) *Re Savage*, [1918] 2 Ch. 146.

(*t*) *Re Beavan*, [1913] 2 Ch. 595.

(*tt*) *Re Broad*, 105 L. T. 719.

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An administrator who is an undischarged bankrupt has no right to retain, out of the assets received by him as administrator, a debt due to him from the deceased (*u*).

Set-off.

Set-off. There is some inaccuracy in the use of the words retainer and set-off. The right of retainer is properly the right of an executor to retain out of the assets a debt due to him as against creditors of the same degree; the term is sometimes applied to cases where a legatee is indebted to the estate and therefore is bound to bring his debt into account; this is also called set-off (*v*). This does not apply where the debt is owed by a partnership of which the legatee is a member (*w*). An executor cannot retain a legacy in satisfaction of a debt due by the legatee to a firm in which the testator was a partner (*x*).

Set-off in its proper use is only applicable to mutual demands, debts and credits. The right of an executor of a creditor to retain a sufficient part of a legacy given by the creditor to the debtor to pay a debt due from him to the creditor's estate is rather a right to pay out of the fund in hand than a right of set-off (*y*).

A legatee who is indebted to the estate must bring into account his debt, although it is statute barred (*z*). Where at the death of a testator a debt is owing to him by a person to whom a share of residue is immediately given by the will, but the debt is payable by instalments, the executors are not entitled to retain the share of the beneficiary as against the future instalments of the debt that may become due, but are bound to pay it to the beneficiary without reference to such instalments (*a*).

If a testator bequeaths to A a legacy and also a share of residue, and directs that debts due by A to the testator's estate shall be set off against his share of residue, this means that the executors are not entitled to set off the debt against the legacy (*d*).

Solvent estates.

III.—Solvent Estates.—When the estate is solvent it makes no difference to the creditors how, or out of which assets, they

(*u*) *Wilson* v. *Wilson*, [1911] 1 K. B. 327.

(*v*) See *Re Greg*, [1921] 2 Ch. 243; *Woodstock* v. *Eames*, 69 Sol. J. 444.

(*w*) *Turner* v. *Turner*, [1911] 1 Ch. 716.

(*x*) *Jackson* v. *Yeats*, [1912] 1 Ir. R. 267.

(*y*) *Cherry* v. *Boultbee*, 4 My. & Cr. 447, quoted in *Re Melton*, [1918] 1 Ch. 37. See also *Re Dane*, [1916] 1 Ch. 344. The rule does not apply to debts which have been extinguished: *Re Bruce*, [1908] 2 Ch. 682; *Re Sewell*, [1909] 1 Ch. 806; nor, where a child takes a share in substitution for a parent, to a debt of the parent; *Re Binns*, [1929] 1 Ch. 677.

(*z*) *Courtenay* v. *Williams*, 3 Hare 539; *Re Ackerman*, [1891] 3 Ch. 212; *Re Wheeler*, [1904] 2 Ch. 66.

(*a*) *Re Abrahams*, [1908] 2 Ch. 69; see *Re Rees*, 60 L. T. 260.

(*d*) *Smith* v. *Crabtree*, 6 Ch. D. 591.

are paid, so long as they are paid, but the order in which the assets should be applied in discharge of the debts (*e*) and liabilities is a matter of importance to the beneficiaries under the will of the deceased.

The new law has made a considerable alteration in this respect, and it may be convenient to compare the old and the new law as regards the order in which the assets of the deceased are applicable towards the discharge of the funeral, testamentary and administration expenses, debts and liabilities.

Death before 1926 (*f*).	*Death after 1925* (*g*).
1. Personalty not specifically bequeathed retaining a fund sufficient to meet any pecuniary legacies.	1. Property of the deceased undisposed of by will subject to the retention thereout of a fund sufficient to meet any pecuniary legacies.
2. Realty specifically appropriated for or devised in trust for (and not merely charged with) payment of debts.	2. Property of the deceased not specifically devised or bequeathed but included (either by a general or specific description) in a residuary gift subject to the retention out of such property of a fund sufficient to meet any pecuniary legacies, so far as not provided for as aforesaid.
3. Realty that descends to the heir.	3. Property of the deceased specifically appropriated or devised or bequeathed (either by a specific or general description) for the payment of debts.
4. Realty charged with the payment of debts [and personalty specifically be-	4. Property of the deceased charged with or devised or bequeathed (either by

(*e*) The interest on debts payable under Order LV, r. 63, is subject to deduction of income tax: *Re Michelham*, [1921] 1 Ch. 705.

(*f*) Maitland, Equity p. 208. The rules for administration under the old law are contained in the previous edition.

(*g*) Administration of Estates Act, 1925, s. 34, sub-s. 3, and Part II of the First Schedule.

queathed subject to a charge of debts] (*h*).	specific or general description) subject to a charge for the payment of debts.
5. Fund (if any) retained to pay general pecuniary legacies.	5. The fund (if any) retained to meet pecuniary legacies.
6. Realty devised whether specifically or by general description and personalty specifically bequeathed *pro rata* and *pari passu* (*i*).	6. Property specifically devised or bequeathed rateably according to value (*k*).
7. Property which did not belong to the dead man, but which is appointed by his will in exercise of any general power of appointment.	7. Property appointed by will under a general power, including the statutory power to dispose of entailed interests rateably according to value (*l*).

Election.

Property brought in by election contributes (*m*).

Secret trust.

Property subject to a secret trust is not for the purpose of the rules treated as part of a residuary bequest (*n*).

The new scheme.

The main principle of the new scheme is to assimilate realty and personalty, but Part II of the First Schedule to the Administration of Estates Act, 1925, does not affect the liability of land to answer the death duty imposed thereon in exoneration of other assets. Section 34 of the Act also provides that section 35 (which extends the operation of the Real Estate Charges Act to personalty) shall apply. See *post*, p. 1987 *seq*.

It will be noticed that whereas land which descended to the heir only ranked as 3 under the old scheme, now land undisposed of by will ranks as 1 under the new scheme, and that numbers 1 and 2 under the old scheme correspond respectively to numbers 2 and 3 under the new, with the difference that in the new scheme no distinction is made between real and personal property. In both schemes there is an apparent ambiguity

(*h*) Maitland omits these words in square brackets.

(*i*) See *Jackson* v. *Pease*, L. R. 19 Eq. 96; *Re Paice*, 31 Ch. D. 485.

(*k*) As to a specific legatee being insolvent, see *Conolly* v. *Farrell*, 10 Bea. 142; *Re Peerless*, [1901] W. N. 151.

(*l*) It is immaterial that the appointment eventually fails to take effect by reason of events happening after the testator's death: *Re Hodgson*, [1899] 1 Ch. 666. As to the effect of the bankruptcy of the testator, see *Re Guedalla*, [1905] 2 Ch. 331; *Re Benzon*, 58 Sol. J. 430.

(*m*) *Re Williams*, [1915] 1 Ch. 450.

(*n*) *Re Maddock*, [1902] 2 Ch. 220.

whether property comprised in a residuary bequest includes property over which a general power of appointment was exercised by virtue of section 27 of the Wills Act. This point arose in *Re Hartley* (*o*), which decides that property subject to a general power of appointment which passes under a residuary gift by virtue of section 27, or by express appointment, is deemed to be in the residuary gift and not to come under 7.

A general power to appoint by will only is a general power within the meaning of rule 7 (*p*).

What is a debt?

For the purpose of the rules, a liability of the testator which constitutes a debt payable by his estate (*q*), is not necessarily considered a debt as between his beneficiaries. Thus in *Hawkins* v. *Hawkins* (*r*), a testator specifically bequeathed certain property to A subject to his debts, and bequeathed his residuary estate to B; the residue included a leasehold house, considerably out of repair; it was held that B could not have the liability of the testator's estate in respect of the repair of the house and the future rent discharged out of the specifically bequeathed property.

Undisposed-of share.

Where, before 1926, the gift of a share of residuary personalty failed by lapse or otherwise, the debts and other liabilities were borne rateably by it and by the shares which were well disposed of (*s*).

This case is altered by the new scheme. Thus in *Re Lamb* (*t*), the testator directed that his residuary real and personal estate should be equally divided between four named persons, one of whom predeceased him. It was held that the

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(*o*) [1900] 1 Ch. 152. This is the effect of the judgment.

(*p*) *Petre* v. *Petre*, 14 Bea. 197; see *Drake* v. *Att.-Gen.*, 10 Cl. & F. 257; *Att.-Gen.* v. *Brackenbury*, 1 H. & C. 782. In *Edie* v. *Babington* (3 Ir. Ch. R. 568) it was held that a power to appoint to anyone except A was a general power of appointment for the purposes of this rule. Compare *Platt* v. *Routh*, 3 Bea. p. 280; S. C. S. N. *Drake* v. *Att.-Gen.*, 10 Cl. & F. 257 (a case on the Legacy Duty Act), and *Re Byron's Settlement*, [1891] 3 Ch. 474, as to which see *ante*, p. 763.

(*q*) See *Sharp* v. *Lush*, 10 Ch. D. 468.

(*r*) 13 Ch. D. 470. See *Eccles* v. *Mills*, [1898] A. C. 360, and *Re Hughes*, [1913] 2 Ch. 491.

(*s*) The earlier cases (including *Cresswell* v. *Cheslyn*, 2 Ed. 123; *Skrymsher* v. *Northcote*, 1 Sw. 566; *Att.-Gen.* v. *Earl of Winchelsea*, 3 Br. C. C. 374; *Att.-Gen.* v. *Hurst*, 2 Cox, 364) are examined in *Eyre* v. *Marsden*, 4 Myl. & C. 231; *Luckcraft* v. *Pridham*, 48 L. J. Ch. 636 (mixed fund); *Trethewy* v. *Helyar*, 4 Ch. D. 53; *Fenton* v. *Wills*, 7 Ch. D. 33; *Blann* v. *Bell*, 7 Ch. D. 382. In most of these cases the gift failed by lapse; in others it failed by being revoked, or because it was to a charity, and failed as to the impure personalty. The same rule applies where an accumulation of income is void under the Thellusson Act, and there is consequently an intestacy: *Eyre* v. *Marsden*, *supra*; *Oddie* v. *Brown*, 4 De G. & J. 179; *Ralph* v. *Carrick*, 5 Ch. D. 984. *Gowan* v. *Broughton*, L. R. 19 Eq. 77, lays down a wrong principle. Compare *Peacock* v. *Peacock*, 34 L. J. Ch. 315.

(*t*) [1929] 1 Ch. 722.

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funeral and testamentary expenses and debts were payable out of the lapsed share. But if the testator had expressly directed the payment of his debts, etc., before the residue was ascertained, the result would have been different (*tt*).

Land abroad.

If a testator domiciled in England dies entitled to immoveable property situate abroad, the question whether and in what manner it can be made liable for his debts, depends on the *lex loci rei sitae* (*u*).

Principle of contribution, when applied.

IV.—Contribution to Charges—Mixed Fund.—" Here it should be observed," says Mr. Jarman (*x*), " that where several distinct properties, subject to a common charge, are disposed of among several persons, recourse is had, by an obvious rule of justice, to the principle of contribution. Thus, if the testator, after subjecting his real estate to the payment of his debts or legacies, devise Blackacre to A and Whiteacre to B, and these estates in the administration of the assets become applicable, the charge will be thrown upon the devisees in proportion to the value of their respective portions of the property (*y*). And, by parity of reason, where several estates, subject to a common charge, devolve by descent upon different persons (which happens where they descended to the last owner from opposite lines of ancestry, and his own paternal and maternal heirs are different persons, or they are held by several tenures, involving different courses of descent), the same principle of contribution obtains (*z*).

Immaterial that part of the property charged is real and part personal.

" And the rule is the same where the property charged is partly real and partly personal. Thus, if a testator, after commencing his will with a general direction that his debts shall be paid, proceeds to dispose specifically of his real and personal estate among different persons; as the charge would, we have seen, affect the whole property so given, real as well as personal, the devisees and legatees will bear their respective shares of the burden *pro rata* (*a*).

(*tt*) *Re Petty*, [1929] 1 Ch. 726; *Re Atkinson*, [1929] W. N. 189.

(*u*) *Harrison* v. *Harrison*, L. R. 8 Ch. 342. As to the case of a person domiciled abroad, see *Re Hewit*, [1891] 3 Ch. 568; *Blackwood* v. *R.*, 8 A. C. 82; *Henty* v. *R.*, [1896] A. C. 567.

(*x*) First ed., Vol. II, p. 548.

(*y*) See *Heveningham* v. *Heveningham*, 2 Vern. 355, 1 Eq. Ca. Ab. 117, pl. 5; *Growcock* v. *Smith*, 2 Cox. 397; *Carter* v. *Barnardiston*, 1 P. W. 505; *Johnson* v. *Child*, 4 Hare, 87. See also 3 P. W. p. 98. A residuary devise was specific for the purposes of this rule: *Gibbins* v. *Eyden*, L. R. 7 Eq. 371.

(*z*) See Lord Eldon's judgment in *Aldrich* v. *Cooper*, 8 Ves., at p. 390. See this case and *Leonino* v. *Leonino*, 10 Ch. D. 460, as to the question whether a mortgage equally affects both subjects comprised in it, or the one is to be first applied. See also *Early* v. *Early*, 16 Ch. D. 214, n.; *Re Athill*, 16 Ch. D. 211 (freeholds and leaseholds); *Re Pimm*, 91 L. T. 190 (freeholds and life policy). So if a testator devises part of his real estate and dies intestate as to the rest, the devisee and heir must contribute rateably to any common charge: *Eyre* v. *Green*, 2 Coll. 527.

(*a*) *Irvin* v. *Ironmonger*, 2 R. & My. 531; *Re Grainger*, 83 L. T. p. 211.

"It should seem then, that, although personalty, not expressly charged with debts, is applicable before real estate not so charged, yet when both species of property are expressly onerated [and the personalty is specifically bequeathed], no distinction of this nature is admitted, but the whole stands on an equal footing."

So if a testator mortgages real and personal property, the debt must be borne by them rateably (*b*), unless of course one is made the primary security (*c*).

Charges must be *ejusdem generis*.

The liability to contribution does not arise unless the two properties are equally charged; consequently, if one is specifically charged and the other is only subject to a general lien, no case for contribution arises (*d*).

Effect where real and personal estate constitute a mixed fund to answer charges.

Mr. Jarman continues (*e*): "In precise accordance with this principle, too, where a testator creates out of real and personal estate a mixed fund to answer certain charges, he is considered as intending, not that the personalty shall be the primary and the realty the auxiliary fund for those charges, but that each shall contribute rateably to the common burden. And it is immaterial that the combined fund comprises the whole of the testator's real and personal estate" (*f*).

Codicil releasing realty.

If a testator, after giving a legacy out of a mixed fund, makes a codicil releasing the realty from liability to the legacy, this does not revoke a proportionate part of the legacy, but throws the whole on the personalty (*g*).

Remainders failing.

If a testator specifically devises realty to A for life with remainders over, and gives his residuary real and personal estate upon trust for conversion and payment of debts, etc., and the remainders of the specifically devised realty fail, so that on

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(*b*) *Trestrail* v. *Mason*, 7 Ch. D. 655, notwithstanding Locke King's Act, *post*, p. 1991; *Leonino* v. *Leonino*, 10 Ch. D. 460; *Evans* v. *Wyatt*, 31 Bea. 217.

(*c*) *Bute* v. *Cunynghame*, 2 Russ. 275. As to *Lipscomb* v. *Lipscomb*, L. R. 7 Eq. 501, and *De Rochefort* v. *Dawes*, L. R. 12 Eq. 540, see *Leonino* v. *Leonino*, 10 Ch. D. 460.

(*d*) *Re Dunlop*, 21 Ch. D. 583. Other special questions as to contribution are discussed in *Solicitors' and General Life Ass. Soc.* v. *Lamb*, 2 D. J. & S. 251; *City Bank* v. *Sovereign Life Ass. Co.*, 50 L. T. 565 (policy of assurance partially valid mortgaged with other property).

(*e*) First ed., Vol. II, p. 549.

(*f*) *Roberts* v. *Walker*, 1 R. & My. 752; *Stocker* v. *Harbin*, 3 Bea. 479; *Shallcross* v. *Wright*, 12 Bea. 505; *Salt* v. *Chattaway*, 3 Bea. 576; *Att.-Gen.* v. *Southgate*, 12 Sim. 77. If the debts have been paid out of the personalty, the real estate must make good the interest on its proportion of the amount: *Ashworth* v. *Munn*, 34 Ch. D. 391; see also *Dunk* v. *Fenner*, 2 R. & My. 557; *Fourdrin* v. *Gowdey*, 3 My. & K. 383; *West* v. *Cole*, 4 Y. & C. 460; *Cradock* v. *Owen*, 2 Sm. & Gif. 241; *Young* v. *Hassard*, 1 Jo. & Lat. 466; *Robinson* v. *London Hospital*, 10 Hare, 19; *Simmons* v. *Rose*, 6 D. M. & G. 411; *Bedford* v. *Bedford*, 35 Bea. 584.

(*g*) *Tatlock* v. *Jenkins*, Kay, 654.

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A's death it falls into residue, its value for the purpose of contribution to debts, etc., is its value when the remainders fall in (*h*).

How a mixed fund is created.

Whether in the particular case a mixed fund has been created is a frequent question. As it concerns the partial exoneration of the personal estate from its regular burdens, it depends on principles presently to be discussed (*i*). It may, however, be observed here that the mere fact that the real and personal estate are given together, upon trust out of the issues, dividends, interest, and profits thereof to pay debts, legacies, or annuities, has been often held insufficient to exempt the personal estate from its primary liability (*k*). And it was said by Sir G. Turner, L.J., in *Tench* v. *Cheese* (*l*), that "in order to effect that purpose there must be a direction for the sale of the real estate, so as to throw the two funds absolutely and inevitably together to answer the common purposes of the will" (*m*).

Allan v. *Gott.*

But this dictum was criticised by James, L.J., in *Allan* v. *Gott* (*n*), where a testator gave his trustees a discretionary power of conversion, and the intention to create a mixed fund was inferred from the whole will, but especially from a reference to "the fund to arise from the residue" of his real and personal estate.

Constructive charge of debts not sufficient.

The mere fact that a testator created a mixed fund for purposes of distribution did not exempt the personalty from its primary liability to debts before 1926, unless they were payable out of the mixed fund. Thus in *Luckcraft* v. *Pridham* (*o*), where the testator, after directing his debts to be paid, gave his real and personal estate upon trust for conversion and division among various beneficiaries, it was held that the personalty was not exempted from its primary liability to debts, although they were charged on the real estate by the operation of the doctrine discussed in an earlier chapter (*p*).

Constructive charge of legacies not sufficient.

Where pecuniary legacies were given, and afterwards "the residue of the real and personal estate," so that under the rule in

(*h*) *Re Moore*, [1907] W. N. 181.

(*i*) *Post*, pp. 1992 *seq.*

(*k*) *Boughton* v. *Boughton*, 1 H. L. C. 406, reversing 1 Coll. 26; *Blann* v. *Bell*, 5 De G. & S., at p. 665; *Tidd* v. *Lister*, 3 D. M. & G. 857; *Bentley* v. *Oldfield*, 19 Bea. 225; *Tench* v. *Cheese*, 6 D. M. & G. 453; *Ellis* v. *Bartrum* (*No.* 3), 25 Bea. 110.

(*l*) 6 D. M. & G., at p. 467.

(*m*) See the cases above cited, n. (*f*). See also *Hopkinson* v. *Ellis*, 10 Bea. 169, and *Bright* v. *Larcher*, 3 De G. & J. 148, where the proceeds of sale of the real estate were directed to be disposed of in the same way as the residuary personal estate, and it was held that this created a mixed fund; *Simmons* v. *Rose*, 6 D. M. & G. 411, and *Shallcross* v. *Wright*, 12 Bea. 505, were similar cases.

(*n*) L. R. 7 Ch. 439. Compare *Howard* v. *Dryland*, 38 L. T. 24.

(*o*) 48 L. J. Ch. 636.

(*p*) *Ante*, p. 1943.

Greville v. *Browne* (*q*), the legacies were charged on the realty, the realty was liable only in aid of the personalty; unless the testator had directed the payments to be made out of the mixed fund, in which case the realty and personalty were liable *pari passu* (*r*).

Income treated as mixed fund.

If a testator gives his real and personal property to trustees upon trust out of the rents and income to pay certain annuities, they are payable rateably out of the whole income as one fund. The rule in *Boughton* v. *Boughton* (*s*) does not apply to such a case (*t*).

Implied exoneration of a legatee from order of administration directed.

The order in which a testator directs his estate to be administered may be such as impliedly to show that one of two devisees or legatees is to have priority over the other, though under the gift simply to them they would have contributed rateably to payments of debts (*u*).

Foreign land charged with legacies.

In *Re Smith* (*x*), the testator gave certain legacies free of duty, and, subject to the payment of the said legacies and duties and his funeral and testamentary expenses, he devised and bequeathed all his real estate situate in the Argentine Republic, together with farming stock, etc., there, unto his trustees upon trust to sell, and, after payment of the expenses, to pay the residue to the children of his two brothers in equal shares; he devised and bequeathed the residue of his real and personal estate to his trustees in trust for the plaintiff. Held, (i) that the charge was confined in its operation to the Argentine property; (ii) that the rule which required that there must be found in the will an intention not only to charge the realty, but to discharge the personalty, applied to realty situate outside the jurisdiction; (iii) that the fund was not a true mixed fund within *Roberts* v. *Walker* (*y*), inasmuch as there was no trust for conversion of the whole real and personal estate for the purposes of satisfying the charge; and, therefore, that the devise of real estate in the Argentine charged with this payment made it an auxiliary fund to the personalty but did not operate to exonerate

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(*q*) 7 H. L. C. 689, *ante*, p. 1953. The rule that, in such a case, the legacies are charged on the realty, apparently applies to a gift of legacies, followed by a gift of all the residue of the testator's property and over which he has a power of appointment: *Gainsford* v. *Dunn*, L. R. 17 Eq. 405; but not where the gift is of *all* the realty and the residue of the personalty: *Wells* v. *Row*, 48 L. J. Ch. 476.

(*r*) *Elliott* v. *Dearsley*, 16 Ch. D. 322; *Re Ovey*, 31 Ch. D. 113; *Re Boards*, [1895] 1 Ch. 499, *ante*, p. 1955; *Re Balls*, [1909] 1 Ch. 791.

(*s*) *Ante*, p. 1980.

(*t*) *Falkner* v. *Grace*, 9 Ha. 280; *Howard* v. *Dryland*, 38 L. T. 24.

(*u*) *Legh* v. *Legh*, 15 Sim. 135. See also *Raikes* v. *Boulton*, 29 Bea. 41; *Earl of Portarlington* v. *Damer*, 4 D. J. & S. 161; *Bateman* v. *Hotchkin*, 10 Bea. 426.

(*x*) [1913] 2 Ch. 216.

(*y*) 1 Russ. & My. 752.

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the personalty from its primary liability, but that, as the rule applicable to realty had no application to the personalty, the concurrent charge of legacies and debts on the specifically bequeathed personalty did exonerate the residuary personalty from its primary liability.

The authorities cited in this section all relate to wills which came into operation before 1926, when personalty not specifically bequeathed was primarily liable to the payment of debts (*z*).

The new law.

Since then, as we have seen (*a*), in accordance with the general scheme of the new legislation, personalty and realty are put on an equal footing, and the questions which will now arise are whether realty is charged in exoneration of personalty or whether personalty is charged in exoneration of realty.

Incumbrances.

V.—Exoneration of Specific Property.—(1) *Specific Legacies.*—Before 1926 (*b*), the legatee of any chattel, specifically bequeathed, was entitled to be exonerated by the general personal estate from an incumbrance to which the testator, either before or after the making of his will, had subjected it.

Before 1926 chattel must be redeemed for specific legatee.

"Thus if," says Mr. Jarman (*c*), "a testator bequeaths a watch or a painting, and it turns out that at his decease the watch or painting is in pawn, the legatee is entitled to have it redeemed. And by parity of reason if a testator specifically bequeaths a legacy to which he is entitled under a will, and afterwards assigns such legacy by way of mortgage, the legatee may claim to have the mortgage debt liquidated in exoneration of the subject of gift; and it would be immaterial that the mortgage deed contained a power of sale, by virtue of which the mortgagee might have absolutely disposed of the property and thereby have defeated the bequest (*d*); for in all these cases the mortgage being considered to have been created by the testator for his own convenience, and not for the purpose of subtracting so much from the bequest, the act is not, as between the parties claiming under the will, an ademption *pro tanto*, and cannot, without at least equal impropriety, be termed a partial revocation, though the latter designation has been commonly applied to it. If, therefore, the testator's right of redemption remain unbarred at his decease, the devisee or

(*z*) See the earlier editions of this work. Maitland, Equity, p. 208; Sanger on Wills and Intestacies (1st ed.), p. 93.

(*a*) *Ante*, p. 1975.

(*b*) See now section 35 of the Administration of Estates Act, 1925, *post*, p. 1988.

(*c*) First ed., Vol. II, p. 552.

(*d*) *Knight* v. *Davis*, 3 My. & K. 358. In this case the mortgage was created for the benefit of the legatee himself.

legatee is entitled to require that it shall be exercised for his benefit." And if the executor fails to perform this duty the legatee is entitled to compensation (*e*). Debentures charged on land are within the rule, not being an "interest in land" within the meaning of Locke King's Act (*f*).

Right as against other specific legatees, etc.

The rule only applies to the general personal estate, and the legatee of an incumbered chattel or chose in action is not entitled to exoneration or contribution by other specific legatees or devisees, even if the testator has by his will directed the incumbrance to be paid off out of the general personal estate (*g*), or given a general direction for payment of his debts (*h*).

Liabilities.

And the rule only applies to incumbrances created by the testator: it does not apply to liabilities incident to the property bequeathed and not resulting in a debt due by the testator in his lifetime (*i*). Thus, if the testator holds shares not fully paid up, and bequeaths them to A, the testator's estate is liable for all calls made during his lifetime, and A must pay any calls made subsequently (*k*).

Several earlier cases, so far as they conflict with the principle above stated, must be considered overruled. In some of them, however, the decision appears to have turned on the fact that the testator had entered into a contract to pay the calls within a certain period (*l*). The decision of North, J., in *Re Stevens* (*m*) seems to rest on this principle. There the testator gave to his partner notice of his intention to exercise an option given to him by the articles of partnership to purchase the partner's share in the business, but died before completion of the purchase, having by his will bequeathed all his estate and interest in the partnership business in trust for L.; it was held that L. was entitled to the share which the testator was bound to purchase,

(*e*) *Bothamley* v. *Sherson*, L. R. 20 Eq. 304; *Ellis* v. *Eden*, 25 Bea. 482.

(*f*) *Re Chantrell*, [1907] W. N. 213.

(*g*) *Halliwell* v. *Tanner*, 1 R. & My. 633.

(*h*) *Re Butler*, [1894] 3 Ch. 250, which is inconsistent with *Irvin* v. *Ironmonger*, 2 R. & My. 531 and the New South Wales case of *Ramsey* v. *Lowther*, (1912), 16 C. L. R. 1.

(*i*) *Bothamley* v. *Sherson*, *supra*. The case of *Stewart* v. *Denton* (4 Doug. 219), where the customs duties on wines specifically bequeathed were held to be payable out of the general personal estate, is commented on in *Bothamley* v. *Sherson*. As to a bequest of property belonging to a partnership, and subject to the partnership debts, see *Farquhar* v. *Hadden*, L. R. 7 Ch. 1; *Re Holland*, [1907] 2 Ch. 88, *post*, p. 1986.

(*k*) *Armstrong* v. *Burnet*, 20 Bea. 424; *Addams* v. *Ferick*, 26 Bea. 384. *Day* v. *Day*, 1 Dr. & Sm. 261.

(*l*) *Blount* v. *Hipkins*, 7 Sim. 43; *Jacques* v. *Chambers*, 2 Coll. 435, 4 Rly. Cas. 205, 11 Jur. 295; *Wright* v. *Warren*, 4 De G. & Sm. 367; see *Barry* v. *Harding*, 1 Jo. & Lat. 475. The decision in *Moffett* v. *Bates*, 3 Sm. & G. 468, seems to have turned partly on the question of the repudiation by the legatee; see *ante*, p. 530.

(*m*) [1888] W. N. 110.

and to have the same paid for out of the testator's general estate. It is hardly necessary to say that the general rule does not apply if the testator gives express directions as to payment of calls (*n*).

Tenant for life of shares.

Where shares are given to a person for life with remainder over, different considerations arise (*o*). Thus, in *Re Box* (*p*) the testator bequeathed the residue of his personal estate upon trust for his wife for life, and after her death he gave certain shares, forming part of the residue, to different persons absolutely. Calls were made on these shares during the widow's lifetime, and Wood, V.-C., decided that as the shares were not to be severed from the general residue until her death, the calls were payable out of the residue, and not by her. If the shares had been given to her for life as a specific bequest, "such shares would be taken by the legatees *cum onere*, and that the tenant for life, and those entitled in remainder, would have to provide for the payment of the calls, either out of the shares themselves or otherwise, as they might think fit; the residue of the testator's estate would have nothing further to do with them" (*q*). As between the tenant for life and the remainderman, it seems that in such a case, in accordance with the principle stated in Chap. XXXIV, the tenant for life would be entitled to have the amount required for payment of the calls raised out of capital, she paying the interest on it during her life (*r*).

Incumbrances.

(2) *Leaseholds.*—As regards incumbrances, leaseholds were formerly subject to the same rules as freehold land; these rules are stated below (*s*). Locke King's Act and the amending Act of 1867 did not apply to leaseholds (*t*), but the Act of 1877 brought them within the operation of all three Acts (*u*).

Liabilities.

As regards liabilities other than incumbrances within the scope of Locke King's Act (which, it will be remembered, includes vendor's liens and judgment debts), the general rules applicable to specific bequests of chattels personal apply also to leaseholds. Accordingly all rents and other debts which accrue due in respect of leaseholds during the testator's lifetime are

(*n*) *Bevan* v. *Waterhouse*, 3 Ch. D. 752.

(*o*) In *Clive* v. *Clive*, Kay, 600, Wood, V.-C., simply followed *Blount* v. *Hipkins*, 7 Sim. 43.

(*p*) 1 H. & M. 552.

(*q*) 1 H. & M., at p. 556.

(*r*) See *Fitzwilliams* v. *Kelly*, 10 Ha., at p. 279.

(*s*) Pp. 1986 *seq.* If the general personal estate was insufficient, the specific legatee of leaseholds took them *cum onere*, as was (before 1926) the rule in the case of chattels personal (*ante*, p. 1982): *Halliwell* v. *Tanner*, 1 R. & Myl. 633.

(*t*) *Solomon* v. *Solomon*, 33 L. J. Ch. 473; *Re Wormsley's Estate*, 4 Ch. D. 665.

(*u*) *Re Kershaw*, 37 Ch. D. 674.

payable out of the general personal estate : all future rents and liabilities must be borne by the legatee (*x*). Dilapidations under a repairing lease, although existing at the time of the testator's death, constitute a liability and not a debt within the meaning of the rule (*y*).

Tenant for life.

If leaseholds are specifically bequeathed to A for life with remainder to B absolutely, A is bound, as between himself and the testator's estate, to pay the head rent and perform the covenants to repair, etc., during his life (*z*) : but not as between himself and the remainderman (*a*). If the property is out of repair at the testator's death, it seems that the cost of putting it in repair ought to be borne by A and B in proportion to their interests; clearly A cannot be called upon to make good dilapidations existing at the testator's death (*b*). As regards expenditure which is properly payable out of capital, the principle stated above in the case of shares in companies seems also applicable to leaseholds. If, therefore, a fine for the renewal of a lease becomes payable during the lifetime of the testator, it is payable out of his general personal estate : any fine becoming payable during the life of the tenant for life must be borne by the tenant for life and remainderman in proportion to their interests, either by making it a charge on the property, in which case the tenant for life keeps down the interest (*c*), or by dividing it between the tenant for life and remainderman by actuarial valuation (*d*).

Leaseholds included in residue.

If leaseholds are bequeathed as part of a residue to be enjoyed in specie by A for life with remainder to B, it seems that they are governed by the rule stated above as applying to shares in companies. If therefore the property is out of repair at the testator's death, the repairs must be borne by the residue and not by the tenant for life (*e*). And if the testator has entered into a covenant to erect buildings on the property, it must be performed at the expense of the residue (*f*).

(*x*) *Barry* v. *Harding*, 1 Jo. & Lat., at p. 489. As to the effect of a gift of leaseholds "free from" or "subject to" outgoings, see *Re Taber*, 46 L. T. 805; *Re Crawley*, 28 Ch. D. 431; Vaizey on Settlements, 332.

(*y*) *Hawkins* v. *Hawkins*, 13 Ch. D. 470; *Hickling* v. *Boyer*, 3 Mac. & G. 635.

(*z*) *Re Redding*, [1897] 1 Ch. 876; *Re Betty*, [1899] 1 Ch. 821; *Kingham* v. *Kingham*, [1897] 1 Ir. R. 170; *Re Gjers*, [1899] 2 Ch. 54. The earlier cases of *Re Baring*, [1893] 1 Ch. 61, and *Re Tomlinson*, [1898] 1 Ch. 232, so far as this point is concerned, may be considered as overruled.

(*a*) *Re Parry and Hopkin*, [1900] 1 Ch. 160.

(*b*) *Re Courtier*, 34 Ch. D. 136, explaining the decision in *Re Fowler*, 16 Ch. D. 723; *Brereton* v. *Day*, [1895] 1 Ir. R. 518.

(*c*) *Fitzwilliams* v. *Kelly*, 10 Ha. 266.

(*d*) *Re Baring*, [1893] 1 Ch. 61. See *Re Hotchkys*, 32 Ch. D. 408, and *ante*, p. 1178.

(*e*) *Harris* v. *Poyner*, 1 Drew. 174. See Vaizey on Settlements, p. 332.

(*f*) *Marshall* v. *Holloway*, 5 Sim. 196. See the remarks on this case in

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Partnership property.

If a testator has a share in the business and the partnership assets include leaseholds, and by his will he bequeaths his share of the leaseholds to A, this entitles A to take it free from liability to contribute to the partnership debts; they must be satisfied out of the other partnership assets (*g*). But if the business is insolvent, A takes subject to the partnership debts; he cannot claim to have them satisfied out of the general personal estate (*h*). But a bequest of a business does not *per se* carry the obligation to discharge the trade liabilities which therefore fall on the residuary estate in the first instance (*i*).

Ordinary outgoings.

(3) *Lands of Inheritance.*—A devisee of land takes it subject to charges and outgoings incident to it—such as quit-rents, chief rents, etc. (*k*), and obligations towards the tenants (*l*).

Partnership property.

Under a devise of land forming part of the assets of a partnership, the devisee takes subject to the partnership debts, if the other assets are insufficient to pay them (*m*).

Contracts to spend money on land.

In *Holt* v. *Holt* (*n*), J. H. entered into an agreement for building a house on land belonging to him and covenanted to pay the builder £1,000 for it. J. H. died intestate before the house was built; it was held that his heir-at-law was entitled to have the house built at the cost of the personal estate. This decision was followed in *Cooper* v. *Jarman* (*o*). And the rule applies to devised land. Thus in *Re Day* (*p*), where a testator entered into a contract for the erection of buildings on land belonging to him, and died before they were completed, having devised the land to A. B., it was held that A. B. was entitled to have the buildings completed at the cost of the personal estate. But the rule does not apply to a contract for the erection of buildings on land belonging to the devisee by an independent title (*q*).

Fitzwilliams v. *Kelly* and *Moffett* v. *Bates*, *supra*, and in *Eccles* v. *Mills*, [1898] A. C. 360.

(*g*) *Re Holland*, [1907] 2 Ch. 88. In this case the property was freehold, but the principle is the same.

(*h*) *Farquhar* v. *Hadden*, L. R. 7 Ch. 1.

(*i*) *Re Timberlake*, 63 Sol. J. 286.

(*k*) As to the liability of a terre-tenant to pay rentcharges (a difficult and obscure subject), see Blyth & Jarman, by Sweet, Vol. IX, 344; *Thomas* v. *Sylvester*, L. R. 8 Q. B. 368, and an article on that case by Mr. T. Cyprian Williams, Law Quarterly Review, xiii, 288. The later cases, following *Thomas* v. *Sylvester*, are referred to in *Re Herbage Rents*, [1896] 2 Ch. 811.

(*l*) *Mansel* v. *Norton*, 22 Ch. D. 769.

(*m*) *Re Holland*, [1907] 2 Ch. 88; *Farquhar* v. *Hadden*, L. R. 7 Ch. 1; *supra*.

(*n*) 2 Vern. 322.

(*o*) L. R. 3 Eq. 98.

(*p*) [1898] 2 Ch. 510.

(*q*) *Re Day*, [1898] 2 Ch. 510.

Covenant running with reversion.

In *Eccles* v. *Mills* (*r*), a lessor entered into a qualified covenant with his lessee to finish some uncompleted improvements on the demised land within a certain time; he died before the period had expired, without having performed the covenant, and having specifically devised the land subject to the lease; it was held that the testator's personal estate must bear the liability. If, however, the covenant had been unqualified, and had been incident to the relation of landlord and tenant (the J. C. held that it related to a matter "preparatory to the complete establishment of that relation") it seems that it would have run with the reversion and bound the devisee.

Mortgage debts, etc.

Before the passing of Locke King's Act (17 & 18 Vict. c. 113), referred to in the following Section of this chapter, the general rule was that if a man borrowed money on mortgage of his land, and by his will devised the land, or allowed it to descend to his heir, the mortgage debt was payable primarily out of his general personal estate, in exoneration of the land (*s*). So if he contracted to purchase land and died before completing the purchase, the money was payable primarily out of his personal estate (*t*).

This rule still applies in cases not falling within Locke King's Act or the amending Acts. Thus if land belonging to a tenant in tail is taken in execution under the Judgments Act, 1838, and he dies before the judgment is satisfied, the debt is payable primarily out of his personal estate in exoneration of the land (*u*).

The earlier editions of this work contain a full discussion of the law before Locke King's Acts. Since this is now becoming obsolete it is omitted in the present edition.

Locke King's Act.

VI.—The Real Estate Charges Acts.—Before 1855, a specific devisee or legatee was entitled to have any charge thereon paid off out of the residuary personal estate. This rule was altered as to a devise of land subject to a mortgage by the Real Estate Charges Act, 1854, commonly known as Locke King's Act. By the Real Estate Charges Act, 1861, it was provided that a direction for the payment of duties was not a sufficient contrary intention. By the Real Estate Charges Act, 1877, leaseholds were included, and the operation of the Act was extended to an equitable charge or lien for unpaid purchase money, and a

(*r*) [1898] A. C. 360 (J. C.); *Re Hughes*, [1913] 2 Ch. 491.

(*s*) *Galton* v. *Hancock*, 2 Atk., at p. 436; *Johnson* v. *Milksopp*, 2 Vern. 112; *Cope* v. *Cope*, 2 Salk. 449; *Howel* v. *Price*, 1 P. W. 292; *Chester* v. *Powell*, 7 Jur. 389.

(*t*) See *Hood* v. *Hood*, 3 Jur. (N.S.) 684; *Barnwell* v. *Iremonger*, 1 Dr. & Sm., at p. 255.

(*u*) *Re Anthony*, [1893] 3 Ch. 498.

contrary intention was not deemed to be signified by a charge of or direction for payment of debts upon or out of residuary real and personal estate or residuary real estate. Finally in 1926, the principle was extended to all kinds of property and the law applicable to deaths occurring after 1925 is now contained in section 35 of the Administration of Estates Act, 1925, which is as follows :—

Section 35 of the Administration of Estates Act, 1925.

" (1) Where a person dies possessed of, or entitled to, or, under a general power of appointment (including the statutory power to dispose of entailed interests) by his will disposes of, an interest in property, which at the time of his death is charged with the payment of money, whether by way of legal mortgage, equitable charge or otherwise (including a lien for unpaid purchase money), and the deceased has not by will deed or other document signified a contrary or other intention, the interest so charged shall, as between the different persons claiming through the deceased, be primarily liable for the payment of the charge; and every part of the said interest, according to its value, shall bear a proportionate part of the charge on the whole thereof.

" (2) Such contrary or other intention shall not be deemed to be signified—

" (a) by a general direction for the payment of debts or of all the debts of the testator out of his personal estate, or his residuary real and personal estate, or his residuary real estate; or

" (b) by a charge of debts upon any such estate;

unless such intention is further signified by words expressly or by necessary implication referring to all or some part of the charge.

" (3) Nothing in this section affects the right of a person entitled to the charge to obtain payment or satisfaction thereof either out of the other assets of the deceased or otherwise."

In *Re Cockcroft* (*x*), Kay, J., made some interesting observations on the three earlier Acts. They extend to a charge created by an elegit (*y*), and to a charge for estate duty under section 2 of the Finance Act, 1894 (*z*); to a joint mortgage by the deceased and another (*a*); to an equitable interest in land to secure an annuity (*b*), but not where the testator is a surety and the principal debtor pays the debt after the testator's death (*c*).

(*x*) 24 Ch. D. 94.
(*y*) *Re Anthony*, [1892] 1 Ch. 450.
(*z*) *Re Bowerman*, [1908] 2 Ch. 340. See *Re Wilson*, [1916] 1 Ch. 220.
(*a*) *Re Williams*, [1915] 1 Ch. 450.
(*b*) *Re Sharland*, 74 L. T. 664.
(*c*) *Re Hawkes*, [1912] 2 Ch. 251.

Separate mortgages.

In *Re Holt* (*d*), A died intestate leaving four distinct portions of real estate each subject to a separate mortgage. In one case the mortgage was in excess of the value of the land charged. Held, that the personal estate and not the rest of the real estate was liable to make good the deficiency.

Contrary intention.

A contrary intention may be shown by an "other document." In *Re Nicholson* (*e*), it was held that a letter to a mortgagee by the testator's solicitors giving notice to pay off the mortgage in six months was not an other document by which the testator had shown a contrary intention. In *Re Beirnstein* (*f*) it was held that a direction in the will to discharge any sums of money secured on mortgage was not a sufficient contrary intention as to a vendor's lien for unpaid purchase money which is essentially different from a mortgage.

Where a testator bequeathed the residue of his personal estate subject to the payment of his "trade debts," and died, having, after the date of his will, deposited with his bankers the title deeds of real estate to secure an overdrawn trade account, it was held that there was a sufficient declaration of contrary intention, so as to exonerate the real estate from the banker's lien (*g*). So where a testator made a distinction between his trade property and trade debts on the one hand and his private property and private debts on the other hand (*h*).

Exception of specific mortgage debt.

A direction to pay debts, "except mortgage debts on Blackacre," out of residue, implies that other mortgage debts are to be paid out of residue (*i*).

"Contrary intention" not shown by provision for payment out of another fund.

Where a testator throws the primary burden of a mortgage debt on a special fund, this does not show a "contrary intention," within the meaning of the Act: the Act is excluded only to the extent of the substituted fund, so that if this proves insufficient the right of exoneration is exhausted and the mortgaged land is liable for the balance. The correct principle was laid down by Chatterton, V.-C., in *Corballis* v. *Corballis* (*k*) where the testator made a special fund primarily liable for certain mortgage debts: "To the extent of this primary fund, the operation of the [Real Estate Charges] Acts is, in my opinion, excluded, but not farther."

(*d*) 115 L. T. 73; distinguishing *Frewen* v. *Law Life Assurance Society*, [1896] 2 Ch. 511, and *Re Baron Kensington*, [1902] 1 Ch. 203.

(*e*) 68 Sol. J. 84.

(*f*) [1925] 1 Ch. 12.

(*g*) *Re Fleck*, 37 Ch. D. 677.

(*h*) *Re Nevill*, 59 L. J. Ch. 511, followed in *Thompson* v. *Bell*, [1903] 1 Ir. R. 489.

(*i*) *Re Valpy*, [1906] 1 Ch. 531.

(*k*) 9 L. R. Ir. 309. See *Allen* v. *Allen*, 30 Bea., at p. 403, *post*, n. (*m*), and *Rodhouse* v. *Mold*, 35 L. J. Ch. 67.

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In *Smith* v. *Moreton* (*l*) a testator conveyed Whiteacre to A subject to the payment of certain mortgages on Blackacre : by his will he devised Blackacre to A : after the testator's death A claimed that the provision in the conveyance of Whiteacre showed an intention to exclude the operation of Locke King's Act, and that he was entitled to have the mortgage on Blackacre discharged out of the general personal estate. Stuart, V.-C., decided against him. The decision is obviously correct, whatever may be thought of the reasons given for it.

Re Birch.

Again, in *Re Birch* (*m*) the testator made various specific devises, including one of Whiteacre to A and B, and directed that "any mortgage debt affecting the hereditaments hereinbefore devised" should be discharged out of the proceeds of sale of Blackacre, which he directed to be sold for that purpose, the balance to fall into residue; the proceeds of sale of Blackacre were insufficient to discharge the mortgage debt on Whiteacre; it was held by Swinfen Eady, J., that A and B were not entitled to have the deficiency paid out of the general personal estate.

So in *Re Fegan* (*n*), where it was held that a personalty fund subject to a mortgage was only exonerated to the extent that a special fund provided by the testator for payment of his debts was available for that purpose.

"Contrary intention" inferred from trusts of will.

The Acts do not prescribe any particular means for signifying an intention to exclude the rule. To ascertain whether such an intention is shown, the whole will (or other document) must, as in other cases, be taken into consideration; and herein the mode in which the mortgaged estate is disposed of is material. Limitations in strict settlement *per se* are inconclusive (*o*); a trust for sale at a future time, with a detailed disposition of the proceeds after deducting costs (but not alluding to the mortgage), possesses more weight (*p*).

Subsequent dealings.

If at the time a testator makes his will, he contemplates executing a mortgage of the real estate devised by his will, the deeds executed by him after the will for the purpose of carrying out the arrangement may be referred to for the purpose of showing an intention to exclude the operation of the Acts (*q*).

(*l*) 37 L. J. Ch. 6.

(*m*) [1909] 1 Ch. 787, where a misleading dictum of Romilly, M.R., in *Allen* v. *Allen*, 30 Bea., at p. 403, is referred to. The dictum in question is less unintelligible if the word "personal" is substituted for "real" in the passage "there is nothing . . . that exonerates the real estate from paying these debts"; compare report of *Re Birch* in the Weekly Notes, [1909] 85.

(*n*) [1928] 1 Ch. 45. This is the first reported case under the new law extending the principle to personalty.

(*o*) See *per* Wood, V.-C., *Pembrooke* v. *Friend*, 1 J. & H., at p. 134; *Coote* v. *Lowndes*, L. R., 10 Eq. 376.

(*p*) *Eno* v. *Tatham*, 3 D. J. & S. 443.

(*q*) *Re Campbell*, [1893] 2 Ch. 206.

In *Syer* v. *Gladstone* (*r*), Pearson, J., expressed the opinion that Locke King's Acts impose no personal liability on a devisee of incumbered land to indemnify the personal estate against the mortgage debt if the land is an insufficient security (*s*).

How charge apportioned;

In *Brownson* v. *Lawrance* (*t*), it was held by Lord Romilly that the fact of the mortgagor having specifically devised part of the mortgaged estate, and left the other part to pass by a residuary devise, was of itself an expression of his intention that the part which passed by the residuary devise should be primarily liable to the whole debt. But the reasoning on which this decision is based is inconsistent with *Hensman* v. *Fryer* (*u*), and *Brownson* v. *Lawrance* may be regarded as overruled (*x*).

—where real and personal property are mortgaged together.

The Acts do not expressly provide for the common case of a mortgage including both land and personal chattels. But it has been held that the debt must in such a case before 1926 be apportioned between the land and the chattels (*y*). The words in the first Act which made the mortgaged land as between the different persons claiming through or under the deceased person primarily liable to all mortgage debts charged thereon, and which by themselves might seem to require exoneration of the chattels by the land, must, it should seem, on a fair interpretation, be controlled by the preceding clause, which defeats the old right of the heir or devisee to exoneration, and which is the governing clause.

Acts apply in favour of the Crown, where no next-of-kin.

Considering the clause last referred to was the substantial part of the enactment, Sir R. Kindersley held that, notwithstanding the words "as between the persons claiming through or under the deceased," the Act applied in favour of the Crown taking the personalty for want of next-of-kin (*z*).

(*r*) 30 Ch. D. 614, *ante*, p. 530.

(*s*) Quoted by Joyce, J., in *Re Lysons*, 107 L. T. 146. See [1902] 1 Ch., at p. 211.

(*t*) L. R. 6 Eq. 1.

(*u*) L. R. 3 Ch. 420.

(*x*) *Sackville* v. *Smyth*, L. R. 17 Eq. 153; *Gibbins* v. *Eyden*, L. R. 7 Eq., at p. 375; *Re Smith*, 33 Ch. D. 195. In *Stringer* v. *Harper*, 26 Bea. 33, 585, the testator exempted his personal estate from his debts.

(*y*) *Trestrail* v. *Mason*, 7 Ch. D. 655; *Leonino* v. *Leonino*, 10 Ch. D. 460. See also *Lipscomb* v. *Lipscomb*, L. R. 7 Eq. 501; *Evans* v. *Wyatt*, 31 Bea. 217; *Gall* v. *Fenwick*, 43 L. J. Ch. 178; the last two being cases of freeholds and leaseholds before the latter were brought within the acts. In *Lipscomb* v. *Lipscomb*, and *Leonino* v. *Leonino*, there was also a question whether on the construction of the mortgages themselves the several mortgaged properties were made liable in any particular order. And see *ante*, p. 1978, n. (*z*). In *Re Bennett*, [1899] 1 Ch. 316, it seems to have been assumed that if the mortgage of a public-house had included the goodwill, the latter would have had to bear its proportion of the mortgage debt: *sed quære*; however, it was decided that the goodwill was not included.

(*z*) *Dacre* v. *Patrickson*, 1 Dr. & Sm., at p. 186.

CHAPTER LIV.

What would exempt personal estate.

VII (*a*).—**What before 1926 was Sufficient Indication of a Testator's Intention to exempt the Personal Estate from its Primary Liability to Debts, etc.**—(1) *Addition of other Fund; Mere Charge on Land, etc.*—Mr. Jarman continues (*b*): "The next subject of inquiry is as to what will exempt the general personal estate from its primary liability to debts and other charges, for which the testator has provided another fund; in other words, what demonstrates an intention that such primary liability shall be transferred to the fund in question; a point which, it will be seen, has been a prolific source of litigation.

Addition of another fund does *not*.

"That the making a provision for debts or legacies out of the real estate does not discharge the personalty, is implied in the very terms of this question. There must be an intention not only to onerate the realty, but to exonerate the personalty; not merely to supply another fund, but to substitute that fund for the property antecedently liable (*c*).

Mere charge on land does not exonerate personalty.

"Thus in numerous cases it has been held that neither a charge of debts on the testator's lands generally, or on a specific portion of them (*d*), nor a devise upon trust for sale, however formally or anxiously framed (*e*), nor the creation of a term of years for the purpose of such charge (*f*), will exonerate the personalty.

"Nor is it material that the charge is imposed on the devisee in the terms of a condition, as where real estate is devised to A, he paying the debts and legacies" (*g*).

Mixed fund.

It has been already mentioned that if a testator creates a mixed fund of real and personal estate and directs it to be applied in payment of his debts or legacies, the realty contributes rateably to the common burden, and the personalty is to that extent exonerated (*h*). Attention has also been drawn to the rule in *Boughton* v. *Boughton* (*i*), that a gift of real and

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(*a*) This section only applies to wills coming into operation before 1926.

(*b*) First ed., Vol. II, p. 564.

(*c*) *Bootle* v. *Blundell*, 1 Mer. 193; *Boughton* v. *Boughton*, 1 H. L. C. 406. See *Re Smith*, [1913] 2 Ch. 216 (foreign land); *Re Patton*, [1925] N. Ir. 206.

(*d*) *White* v. *White*, 2 Vern. 43; *French* v. *Chichester*, *ib.* 568; *Bridgman* v. *Dove*, 3 Atk. 201; *Walker* v. *Hardwick*, 1 My. & K. 396; *Ouseley* v. *Anstruther*, 10 Bea. 453; *Quennell* v. *Turner*, 13 *ib.* 240. See also *Kilford* v. *Blaney*, 31 Ch. D. 56; *Rhodes* v. *Rudge*, 1 Sim. 79, *post*, p. 2004.

(*e*) *Lord Inchiquin* v. *French*, 1 Cox, 1, 1 Wils. 82, Amb. 33; *Samwell* v. *Wake*, 1 B. C. C. 144; *Hancox* v. *Abbey*, 11 Ves., at p. 186; *Collis* v. *Robins*, 1 De G. & S. 131. The rule that a charge of debts on real estate does not of itself exonerate the personal estate applies where a charge for payment of debts after the grantor's death is created by deed: *Trott* v. *Buchanan*, 28 Ch. D. 446.

(*f*) *Tower* v. *Lord Rous*, 18 Ves. 132.

(*g*) *Bridgman* v. *Dove*, 3 Atk. 201; *Mead* v. *Hide*, 2 Vern. 120; *Watson* v. *Brickwood*, 9 Ves. 447; but see *Lockhart* v. *Hardy*, 9 Bea. 379; and Ronan, L.J.'s, judgment in *Duffy* v. *Duffy*, [1920] 1 Ir. R. 122.

(*h*) *Ante*, p. 1979.

(*i*) 1 H. L. C. 406, *ante*, p. 1980.

personal estate together, upon trust to pay debts or legacies, does not necessarily prevent the personal estate from being the fund primarily liable.

History of the implication doctrine.

Mr. Jarman continues (*k*): "In order to exonerate the personal estate, the very early cases required express words (*l*); but this rule was subsequently relaxed, not only by the admission of implication, but that implication was held to be raised by circumstances of a very slight and equivocal character, affording little more than conjecture (*m*). Judges of a later period, however, feeling the evils to which this latitude of interpretation had given rise, and proceeding upon sounder principles of construction, have, without rejecting implication, required that it should be supported by such evidence eviscerated from the will, as ought fairly to satisfy a judicial mind of the testator's intention. A wish has been sometimes intimated, that the old rule had been restored, but this was impracticable in the state of the authorities, and perhaps would have been hardly consistent with right principles of construction, for it is difficult to perceive any solid ground for excluding implication in this more than in any other species of case. The evil seems to have consisted in the extreme laxity with which the implication doctrine was, at one period, applied, which tended in effect to subvert altogether the rule establishing the primary liability of the personal estate; but this has been so far corrected by later adjudications, as greatly to diminish the uncertainty which the numerous cases occurring on the subject indicate to have prevailed half a century ago. From the nature of the question, however, which is ever presenting itself under new combinations of circumstances, it is even now often attended with no little perplexity (*n*).

Rule now established.

"It is well settled that the intent is to be collected from the whole will (*o*), and must appear by 'evident demonstration,' 'plain intention,' or 'necessary implication'; though it must be confessed, that such propositions rather change the terms than afford a solution of the question; for, upon being told that the implication must be necessary, or must amount to evident demonstration, we are inevitably led to inquire what in judicial construction has been held to constitute such 'necessary implication,' or 'evident demonstration'; the answer to which must be an appeal to the cases."

(*k*) First ed., Vol. II, p. 565. (*l*) *Fereyes* v. *Robertson*, Bunb. 301.

(*m*) *Adams* v. *Meyrick*, 1 Eq. Cas. Ab. 271, pl. 13, as to which see 2 Atk. p. 626; 3 Ves. p. 110; *Walker* v. *Jackson*, 2 Atk. 624, and the other cases referred to *post*.

(*n*) *Gittins* v. *Steele*, 1 Sw. 24, was an exceptionally clear case.

(*o*) "Though this has been frequently stated as a rule peculiarly applicable to particular classes of cases, yet the student should be reminded that it is

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Examples of "necessary implication."

An example of such a "necessary implication" is afforded by *Kilford* v. *Blaney* (*p*), where a testatrix devised her real estate upon trust for sale and directed the proceeds to be applied in payment of her funeral and testamentary expenses, debts, and legacies: if the proceeds were insufficient, the proceeds of sale of her leaseholds were to be applied for that purpose: she gave any surplus of the proceeds of sale of the real estate to one class of persons, and the proceeds of sale of the leaseholds, or any surplus of those proceeds, to another class, and gave all her "personal estate" to charity; it was held that the whole will showed an intention to exonerate the general personal estate from its primary liability to debts, legacies, etc.

Other examples are given in a subsequent part of this chapter (*q*).

There is a class of cases in which an intention to exonerate the general personal estate has been inferred from the fact that the real estate is given to trustees in trust to pay debts, etc., and "all the personal estate" is given to X; these cases are considered in a subsequent part of this chapter (*r*). The inference is not drawn where the debts, etc., are merely charged on the real estate (*s*).

An intention to exonerate the general personal estate may also be shown by a direction that the testator's debts shall be paid out of a specific portion of the personal estate (*t*).

Parol evidence inadmissible.

Mr. Jarman continues (*u*): "It has long been established, in opposition to some early decisions (*x*), that, in order to exonerate the personalty, parol evidence is not admissible (*y*), and that no inference of intention can be drawn from the relative amount of the personal estate and debts, or of the personal and

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not confined to *any* class of cases, for it would not be possible to specify any point of testamentary construction which is excluded from its operation; nor is it of novel or recent introduction, for the old authorities never denied the effect of the context to express a particular intention, or control particular expressions. One cannot help, therefore, feeling some surprise that Lord Eldon should treat the applicability of this rule to the cases under consideration as a discovery of Sir W. Grant. 'We have,' said his Lordship in *Gittins* v. *Steele*, 1 Sw. 28, 'now reached the sound rule, that for the purpose of collecting the intention, every part of the will must be considered. That rule was first established by the great judge whom we have just lost, the late Master of the Rolls.'" (Note by Mr. Jarman.)

(*p*) 31 Ch. D. 56.

(*q*) *Post*, p. 1995.

(*r*) *Post*, p. 2002.

(*s*) *Re Banks*, [1905] 1 Ch. 547.

(*t*) *Post*, p. 2011.

(*u*) First ed., Vol. II, p. 567.

(*x*) *Gainsborough* v. *Gainsborough*, 2 Vern. 252. In *Granvill* v. *Beaufort*, *ib.* 648, the evidence was admitted only to rebut an equitable presumption, which was allowable, see *ante*, p. 473.

(*y*) *Inchiquin* v. *French*, 1 Cox, 1; *Stephenson* v. *Heathcote*, 1 Ed., at p. 39.

real estate (*z*); for the fact that the charges will exhaust the whole subject-matter of the residuary bequest does not vary the construction.

Relative amount of debts and personalty not to be considered.

"This was decided in the case of *Tait* v. *Lord Northwick* (*a*), which is a leading authority on the general doctrine. The testator appointed certain estates to trustees, upon trust, by sale or mortgage thereof, or by sale of timber thereon, *to pay his debts*, and directed the trustees to convey the lands not so applied to certain uses. He gave £100 to each of his trustees, and all the residue of his personal estate whatsoever between his two sisters, and appointed two of the trustees executors. Lord Loughborough held that the personal estate was first to be applied, as far as it would go, to pay the debts.

"But in *Gray* v. *Minnethorpe* (*b*), the same Judge thought that where the purchase-money of an estate, devised in trust to be sold to pay debts and certain pecuniary legacies, was inadequate to pay the debts alone, this circumstance furnished an argument *against* exempting the personal estate. Such an argument, however, seems to be obnoxious to the reasoning which applies against making the amount of the personal estate a ground *for* the exemption; since the adequacy of the fund to pay debts must depend upon the amount of those debts at the death of the testator, and their amount at that period can afford no indication of his intention when he made his will."

Mere extension of the charge to funeral and testamentary expenses not sufficient.

(2) *Extension of Charge to Funeral and Testamentary Expenses.*—Mr. Jarman continues (*c*): "It is clear that the charging the land with (in addition to debts) *funeral* or *testamentary* expenses, or both, will not *per se* exempt the personalty; for although it seems improbable that the testator should mean to create an *auxiliary* fund to answer expenses which are payable out of the personal estate in priority to all other claims, and which it could hardly be insufficient to liquidate, yet such an argument amounts only to conjecture, and falls short of that necessary implication which is now held to be requisite to transfer the primary onus to the new fund.

As to funeral expenses, etc., being included.

"Many opinions have been expressed on this point. Thus Lord Hardwicke, in *Walker* v. *Jackson* (*d*) remarked, that the words 'debts, legacies, and funeral expenses,' were only words of style, an observation in which Sir. W. Grant, in *Brydges* v.

(*z*) Cro. El. 205; Cowp. 833; 1 Cox, 9; 2 B. C. C. 273, 297; 2 Ves. jun. 593; 3 Ves. 299; 1 Ed. 43, 1 Ba. & Be. 315, 542; 1 Mer. 222, which overruled Pre. Ch. 101; Cas. t. Talb. 202; 1 B. C. C. 457, n.

(*a*) 4 Ves. 816.

(*b*) 3 Ves. 103.

(*c*) First ed., Vol. II, p. 568.

(*d*) 2 Atk. 624.

Phillips (*e*) seems to have concurred. The circumstance of funeral expenses being included in the charge was also disregarded by Lord Northington, in *Stephenson* v. *Heathcote* (*f*), and by Lord Kenyon in *Williams* v. *Bishop of Llandaff* (*g*), (though the latter Judge decided in favour of the exemption, on grounds perhaps not less equivocal), and by Lord Manners, in *Aldridge* v. *Wallscourt* (*h*). On the other hand, Sir R. P. Arden, in *Burton* v. *Knowlton* (*i*) thought a direction to pay funeral expenses a strong circumstance in favour of the exemption where the trustees of the fund, on whom the direction was imposed, were not the executors to whose duty it naturally belonged. This case, however, has been commented upon both by Lord Loughborough (*k*) and Lord Eldon (*l*), in terms which throw great doubt upon its authority; and, if it rest on this ground (and it is difficult to find one more solid), the decision is clearly overruled by the cases already referred to, and those which remain to be stated.

"Thus, in *Gray* v. *Minnethorpe* (*m*), where the testator devised certain lands to W. and J. and their heirs, in trust to sell, and out of the moneys arising therefrom to pay all his just debts and *funeral expenses*, and the residue over, and appointed his brother G. sole executor; Lord Loughborough held that the executor did not take the personal estate exempt from debts."

Mr. Jarman also cites *Hartley* v. *Hurle* (*n*), and *M'Cleland* v. *Shaw* (*o*), as supporting the general rule.

Trust to pay legacies, funeral and testamentary expenses.

"It is not denied indeed," says Mr. Jarman (*p*), "that the subjecting of the real estate to *all* the charges which belong to the personalty, as legacies, funeral and testamentary expenses, favours the supposition that the personalty is intended to be given as a specific legacy, and consequently to be exempt (*q*); but no case which rests on this simple circumstance is now to be relied on. Such seems to be the situation of the case of *Gaskell* v. *Gough*, cited by Sir R. P. Arden in *Burton* v. *Knowlton* (*r*), which, however, is too loosely stated to enable

(*e*) 6 Ves., at p. 570.
(*f*) 1 Ed. 38.
(*g*) 1 Cox, 254.
(*h*) 1 Ba. & Be. 312; *post*, p. 2001.
(*i*) 3 Ves., at p. 108.
(*k*) See *Tait* v. *Lord Northwick*, 4 Ves., at p. 823.
(*l*) *Bootle* v. *Blundell*, 1 Mer., at p. 229.
(*m*) 3 Ves. 103, *ante*, p. 1995.
(*n*) 5 Ves. 540.
(*o*) 2 Sch. & L. 538.
(*p*) First ed., Vol. II, p. 571.
(*q*) See Sir W. Grant's judgment in *Tower* v. *Lord Rous*, 18 Ves., at p. 139. Also *Greene* v. *Greene*, 4 Mad. 148; *Michell* v. *Michell*, 5 Mad. 69; *Driver* v. *Ferrand*, 1 R. & My. 681.
(*r*) 3 Ves., at p. 111. See also *Kynaston* v. *Kynaston*, 1 B. C. C. 457, n.; *post*, p. 2001, n. (*l*).

us to form a satisfactory opinion of the grounds of it. It does not appear who was the executor, or in what terms the personalty was given.

Effect of testamentary charges being thrown on real estate.

"In the much considered case of *Bootle* v. *Blundell* (*s*), the extension of the charge to funeral and testamentary expenses seems to have been treated by Lord Eldon as having much weight, though it was there aided by the circumstance, that some particular charges incident to the administration of the estate, namely, that of supporting the will against any attempt to invalidate it, was, by a codicil, imposed *exclusively* on the real estate. 'On looking through the precedents (said his Lordship), it is impossible to deny that this is a circumstance on which great stress has always been laid; namely, where the real estate is made liable to such expenses as exclusively regard the administration of the personal estate, such as the costs of probate, and other costs sustained in the execution of the will'" (*t*).

The result of the cases seems to be that a charge of debts and funeral and testamentary expenses cannot now be relied on as in itself sufficient to exonerate the personal estate. It must appear, not necessarily by express words, but by plain and necessary inference from the context of the will that the testator intended not merely to onerate the real estate but to exonerate and discharge the personal estate (*u*).

Where personalty is expressly subjected to legacies or a class of debts.

(3) *Effect of expressly subjecting Personalty to certain Charges.*—Mr. Jarman continues (*w*): "It has been decided that the *expressly* subjecting the personal estate to certain charges, to which it was before liable, does not, by force of the principle *expressio unius est exclusio alterius*, raise a necessary implication that it is not to bear other charges *not* so expressly directed to be payable out of it, but which are thrown upon the land.

"Thus, in *Brydges* v. *Phillips* (*x*), where the testator devised certain real estate upon trust for sale, and out of the money arising thereby *to pay his debts* and certain legacies, and devised over the lands which should remain unsold. The testator then gave certain other legacies, *and directed the last-mentioned legacies to be paid out of his* PERSONAL *estate*, and bequeathed the residue of his said personal estate, except as aforesaid, to his wife, whom, with two other persons, he appointed his executrix and executors: Sir W. Grant, M.R., held that though there was

(*s*) 1 Mer. 193.
(*t*) See *Coote* v. *Coote*, 3 J. & Lat. 175.
(*u*) *Kilford* v. *Blaney*, 31 Ch. D. 56; *Re Banks*, [1905] 1 Ch. 547.
(*w*) First ed., Vol. II, p. 572.
(*x*) 6 Ves. 567; and see *Davies* v. *Ashford*, 15 Sim. 42.

room for conjecture, that the testator did mean to throw his debts primarily upon the real estate, yet that this did not appear with a sufficient degree of certainty to enable him judicially to collect such an intention. He said, that by directing the legacies to be paid out of the personal estate, the testator might merely have intended to distinguish those legacies from the others which were to be paid out of the real estate. His Honor also adverted to the circumstance, that the trustees and executors were not wholly the same persons.

"This principle, too, was strongly recognised by the same learned Judge in *Watson* v. *Brickwood* (*y*), which also establishes, that an intimation, however anxiously made, as to the proportions and mode in which the charge is to be borne among the devisees of the real estate, will not have the effect of onerating it primarily; such a clause being considered only as providing for the event, *in case the land does become chargeable*, and not as charging it at all events" (*z*).

Personalty held not to be exempt though land charged.

In that case the testator directed that the residuary legatee, who was also appointed executor, should pay out of the personal estate all legacies, funeral expenses, and simple contract debts, and he made provision for the discharge of his specialty debts by the persons from time to time entitled to the real estate, which was devised in strict settlement. By a codicil he authorised his trustee to raise money for payment of his debts and legacies by mortgage of the real estate.

Sir W. Grant's judgment in *Watson* v. *Brickwood*.

"It was contended that the personal estate was discharged from the debts, or at least subject only to the *simple contract* debts: but Sir W. Grant was of a different opinion. He admitted that there was some indication of an intention to exonerate the personalty; but thought *that it was not so conclusive as to come up to the requisition of the rule laid down by Lord Thurlow, in The Duke of Ancaster* v. *Mayer* (*a*), *that is, a plain intention;* and that by directing the executor, to whom he gave all his personal estate, to pay thereout all the legacies, funeral expenses and simple contract debts, *prima facie* there was some appearance of an intention that he did not mean the personal estate

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(*y*) 9 Ves. 447; and see 1 Jo. & Lat., at p. 363.

(*z*) "But see *Anderton* v. *Cook*, cit. 1 B. C. C. 456; *Williams* v. *Bishop of Llandaff*, 1 Cox, 254, where an estate was charged *in case another estate devised upon trust to pay debts should be insufficient*; and the personal estate was held to be exempt. Such a case seems to fall directly within the principle stated in the text. It does not appear, however, whether the decisions rested on the words in question. See another case of this kind, *Dawes* v. *Scott*, 5 Russ. 32." (Note by Mr. Jarman.) His statement of *Watson* v. *Brickwood*, which is lengthy, is omitted in this edition.

(*a*) "1 B. C. C. 454. This case was decided by Lord Thurlow principally upon another point (see *ante*), but the positions laid down by him on the doctrine in discussion have been much referred to." (Note by Mr. Jarman.)

to be liable to debts *by specialty*, but that alone upon the authorities was not sufficient (*b*); there must be a charge clearly and distinctly upon the real estate (*c*) to make it liable. . . . It was contended, his Honor said, that the codicil operated as a total exoneration both from debts and legacies; the codicil contained as complete a provision for all debts and legacies as could be; but that was nothing more than there was in *Tait* v. *Northwick* (*d*). This case was hardly so strong in that respect, for in that case there were more circumstances from which it might have been argued that the testator could not have had it in contemplation to burden his real estate merely in aid of the personal. At most this was but the same case, and could not be contended higher than as equivalent to that; and there Lord Rosslyn, adhering to Lord Thurlow's rule, said expressly that the most anxious provision for payment of debts out of the real estate would not be sufficient to exonerate the personal estate. His Honor was therefore of opinion that there was no exoneration of the personal estate.

Watson v. *Brickwood* approved by Lord Eldon.

"Of this case Lord Eldon has said (*e*), that he thought it was rightly decided, taking the will and codicil together; 'but if (said his Lordship), the codicil had not existed, there are circumstances which appear to me to be such as might have given occasion to some observations which do not occur either in the judgment or in the argument; *still I repeat that I think that case was rightly decided.*'

"The case of *Watson* v. *Brickwood* is an important authority on the general doctrine, since no case better exemplifies the species of evidence which is necessary to exonerate the personal estate, as distinguished from mere conjecture. It would have been well if this principle had been steadily adhered to."

Effect where the gift is of *all* the personal estate to person made executor.

(4) *Effect of Gift of "all" the Personalty.*—Mr. Jarman continues (*f*): "Another question which has much divided the opinions of Judges is, whether the circumstances of the bequest being of *all* the personal estate (with or without an enumeration of particulars), not a gift of *the residue*, demonstrates an intention to exempt it from the charges to which the general personal estate is primarily liable. The negative appears to have been decided in several instances where the legatee was appointed executor, a circumstance which has always been considered to

(*b*) Cited and followed by Sugden, L.C., in *Bateman* v. *Earl of Roden*, 1 J. & Lat. 356.
(*c*) And that *only*. See the sequel of the judgment.
(*d*) 4 Ves. 816; *ante*, p. 1995.
(*e*) In *Bootle* v. *Blundell*, 1 Mer., at p. 230.
(*f*) First ed., Vol. II, p. 577.

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favour the non-exemption, by raising the inference that the legatee was to take the personalty subject to the charges devolving upon him in the character of executor. *French* v. *Chichester* (*g*) has generally been treated as a case of this kind. The testator there directed that the trustees of a certain real estate which he had conveyed by deed should out of the trust estate pay his debts, legacies, and funerals; and devised to his wife, whom he made executrix, *all his personal estate not otherwise disposed of*, intending thereby a provision for her, she having been prevailed upon to sell away part of her own inheritance. Lord Keeper Wright, and afterwards Lord Cowper, held that the devise being in the same clause in which she was named executrix, and not said exempt from the payment of debts she must therefore take it as executrix, and the same must be applied in payment of debts (*h*).

Bequest of *all* the personal estate *not otherwise disposed of* to executrix.

"But in this case the words 'not otherwise disposed of' renders it scarcely distinguishable from that of a residuary bequest. A similar remark applies to *Watson* v. *Brickwood* (*i*) and *Bootle* v. *Blundell* (*j*); but as in both these cases there were anterior specific bequests, to which the words 'hereinbefore disposed of' might relate, no argument against the exemption could be drawn from them. It is only where the will contains no other disposition than the charges which are to come out of the personal estate that such an argument applies; and it would seem, by parity of reason, that it is then only that even the circumstance of the gift being *residuary* raises any very strong inference *against* the exemption, though in every case the fact of the bequest *not* being residuary in its terms may afford an argument *in favour of* the exemption.

Trust to pay *all* the debts and bequest of *all* monies, etc. to executor.

"The case of *Brummel* v. *Prothero* (*k*), however, seems more directly to support the doctrine in question; and it is observable that in this case the land was devised in trust to pay *all* the testator's debts. The testator devised all his real estate to A. and his heirs in trust, in the first place, to pay *all* his just debts, and then to other limitations. Lastly, he gave and bequeathed unto his brother E. all his *monies, goods, chattels, rights, credits, personal estate, and effects*, whatsoever and wheresoever, *and appointed him executor*. Sir R. P.

(*g*) 2 Vern. 568, 3 B. P. C. 16; see the facts and points in this case more fully stated in *Trott* v. *Buchanan*, 28 Ch. D. 446. And see *Harewood* v. *Child* and *Bromhall* v. *Wilbraham*, cit. Cas. t. Talb., at p. 204.

(*h*) The main question argued in the House of Lords seems to have been whether the testator's personal estate was exonerated by virtue of the trust deed: *Trott* v. *Buchanan*, 28 Ch. D. 446.

(*i*) 9 Ves. 447.

(*j*) 1 Mer. 193.

(*k*) 3 Ves. 111.

Arden, M.R., at first expressed an opinion that a direction to pay *all* the debts would, according to the authorities, throw them upon the land only; but he afterwards came to a contrary conclusion, observing that the case was stripped of every circumstance to exonerate the personal estate, except that of a devise to a trustee for payment of debts, and a general bequest of the personal estate to the executor; and that there was no one case since *French* v. *Chichester*, the first upon the subject, in which such words as these had been held alone sufficient to exempt the personal estate (*l*).

Devise subject to debts, etc., and bequest of *all* the personalty to executors upon trust.

"So, in *Aldridge* v. *Lord Wallscourt* (*m*), where A. devised all his lands to trustees (subject to the payment of his just debts, funeral expenses, and several portions afterwards charged for his daughters) to certain limitations, and directed his trustees to raise certain portions for his daughters. He appointed T., his son, executor, and bequeathed him *all* his personal estate in trust for such persons as he (the testator) should appoint. By a codicil reciting that bequest, he directed his executor to hold the personal estate in trust for his daughter M. Lord Manners thought there was nothing to exempt the personal estate from its primary liability to debts.

Remark on *Aldridge* v. *Lord Wallscourt*.

"In this case the legatee herself was not the executrix, but as the subject of gift was to flow to her through the executor as trustee, it might be considered as subject to charges attaching to him in that character, and consequently as falling under the same principle."

Trust to sell realty and pay debts and bequest of all personalty to person not executor.

But the personal estate has been held not to be exonerated, even where the legatee of all the personalty was not made

(*l*) "This is not quite correct. There are several cases in which a contrary decision has occurred under circumstances hardly distinguishable. Thus, in *Kynaston* v. *Kynaston*, 1 B. C. C. 457, n., a testator charged his whole estate with the payment of all his debts, legacies, and funeral expenses, and for that purpose devised particular lands to trustees, upon trust to sell the same and pay his debts, legacies and funeral expenses; and he gave to his wife *all* his personal estate whatsoever, and constituted her sole executrix. The debts exceeded the personal estate (a circumstance which is now immaterial). Lord Bathurst determined the personal estate to be exempt.

"So, in *Holliday* v. *Bowman*, cit. 1 B. C. C. 145, A devised a manor to trustees, in trust to sell, and directed the monies to be raised thereby to be paid in discharge of all his debts; and after payment thereof, in the first place to invest the residue, and pay the interest to his wife for life, and the principal after her decease to B; and, after several specific and pecuniary legacies, gave to his wife *all* his goods and chattels, and appointed her executrix. It was held, upon the authority of *Kynaston* v. *Kynaston*, that the personalty was exempt from the debts. *Bamfield* v. *Wyndham*, Pre. Ch. 101, is a case of the same kind, but is much weakened as an authority by the stress that was laid upon the inadequacy of the personalty to pay the debts. How far Lord Bathurst was influenced by this circumstance in *Kynaston* v. *Kynaston* does not appear; but it is evident that both this case and *Holliday* v. *Bowman* are overruled by *Brummel* v. *Prothero*. It would have been more satisfactory if they had been noticed in that case." (Note by Mr. Jarman.)

(*m*) 1 Ba. & Be. 312.

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executor. Thus, in *Collis* v. *Robins* (*n*) the testator devised his real estate to trustees, upon trust to sell and out of the produce to pay the testator's debts, and the costs, charges, and expenses of the trustees (who were also executors), and certain legacies; and he bequeathed all his ready money and securities for money, and all other his personal estate to his godson who was not an executor. Knight Bruce, V.-C., decided that the personal estate was not exonerated.

Conclusion from preceding cases.

Though these cases may seem to authorise the conclusion that, whether the legatee is appointed executor or not (notwithstanding the funeral expenses are thrown upon the land), the personalty is not exempted by the mere circumstance of the bequest being of *all* the personal estate, with or without an enumeration of particular species of property, yet in several instances the distinction between such a bequest and a gift of the *residue* has been treated as having weight (*o*).

Bequest of *all* the ready money, etc., and personal estate.

Cases of exemption upon grounds not now deemed satisfactory.

"In several subsequent cases, indeed," says Mr. Jarman (*p*), "one main ground of exemption was, the fact of the personalty being given, not as a residue, but as *all* the personal estate, accompanied by an enumeration of articles, notwithstanding that in one of them it may be inferred that the trustees of the real estate were executors; but it is observable that in all these cases the real estate was onerated with all the charges to which the personal estate is liable, namely, the debts, funeral expenses, and costs of proving the will. The first is *Greene* v. *Greene* (*q*), where the testator, in the first place, gave and bequeathed unto his wife all his *ready money, securities for money, goods, chattels, and other personal estate and effects whatsoever*, which he should be possessed of or entitled to at the time of his decease, except such part or parts thereof which, by that his will or by any codicil or codicils thereto, he should dispose of specifically to and for her own sole and absolute use; he also devised his real estate to A, B and C, upon trust for sale, directing them, out of the monies arising from such sale, to pay *his debts, funeral expenses, and the costs of proving his will;* and, after payment thereof, to invest the residue upon certain trusts for his wife for life, and then for his children; and he appointed his wife and A, B, and C, executrix and executors. Sir

Devise of real estate upon trust to pay debts, funeral and testamentary expenses, and gift of *all* personal estate.

(*n*) 1 De G. & S. 131. In *Ouseley* v. *Anstruther*, 10 Bea. 453, where the debts were charged on the real estate, the decision was to the same effect.

(*o*) *Tower* v. *Lord Rous*, 18 Ves., at p. 139; *Bootle* v. *Blundell*, 1 Mer., at p. 228. See Lord Northington's judgment in *Stephenson* v. *Heathcote*, 1 Ed. 38; Lord Thurlow's in *Duke of Ancaster* v. *Mayer*, 1 B. C. C. 454 (see also 1 Mer. p. 223); Lord Alvanley's in *Burton* v. *Knowlton*, 3 Ves., at p. 108; Lord Hardwicke's in *Walker* v. *Jackson*, 2 Atk., at p. 624.

(*p*) First ed., Vol. II, p. 582.

(*q*) 4 Mad. 148.

John Leach, V.-C., held the personal estate to be exempt. . . . His Honor distinguished the case from *Duke of Ancaster* v. *Mayer* (*r*), *Stephenson* v. *Heathcote* (*s*), *Inchiquin* v. *O'Brien* (*t*), *Tait* v. *Northwick* (*u*), and *Watson* v. *Brickwood* (*x*), on the ground that, in those cases, the bequest was of a residue; and observed that in the latter it was given expressly after payment of debts, funeral expenses, and legacies. He relied upon *Burton* v. *Knowlton* (*y*) and *Kynaston* v. *Kynaston* (*z*). But in reference to *Watson* v. *Brickwood*, it is to be observed that the clause expressly subjecting the personalty to the payment of legacies, funeral expenses, and debts, referred to simple contract debts only; whereas the only argument in favour of the exemption much insisted on, was in relation to specialty debts, the exclusion of which from the clause in question favoured their being thrown exclusively on the real estate.

Remarks upon *Greene* v. *Greene*.

"The principal circumstances in which the case of *Greene* v. *Greene* differs from *Brummel* v. *Prothero* (*a*) are, that in the latter case the legatees of the personalty were also the executors, whereas in *Greene* v. *Greene* the legatee was only *one* of the executors, and the land was onerated with *all* the charges which would otherwise have come out of the personal estate, namely, the debts and funeral *and testamentary* expenses; but in *Brummel* v. *Prothero* with the debts only.

After citing *Michell* v. *Michell* (*b*), *Driver* v. *Ferrand* (*c*), *Blount* v. *Hipkins* (*d*), and *Jones* v. *Bruce* (*e*), all of which

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(*r*) 1 B. C. C. 454.
(*s*) 1 Ed. 38.
(*t*) Amb. 33 (*Lord Inchiquin* v. *French*).
(*u*) 4 Ves. 816.
(*x*) 9 Ves. 447.
(*y*) 3 Ves. 107; "but this case has been noticed with disapprobation both by Lord Loughborough in *Tait* v. *Northwick*, 4 Ves. 823, and by Lord Eldon in *Bootle* v. *Blundell*, 1 Mer. 229. Besides, it was a bequest of *the residue*, which increases the surprise that it should be cited by Sir John Leach, who rested the exemption mainly on the circumstance of the bequest being of the whole, as distinguished from the residue, of the personal estate." (Note by Mr. Jarman.)
(*z*) Cit. 1 B. C. C. 457. "The authority of this case is considerably weakened by the stress laid on the inadequacy of the personal estate to pay the debts. It is clearly irreconcileable with the current of authorities, particularly *French* v. *Chichester*, *ante*; *Brummel* v. *Prothero*, *ante*; and *Aldridge* v. *Lord Wallscourt*, *ante*, being nothing more than a charge upon the land of all the debts, and a gift of all the personal estate to the individual who was appointed executrix. According to those cases, therefore, the personalty was not exempt." (Note by Mr. Jarman.)
(*a*) *Ante*, p. 2000.
(*b*) 5 Mad. 69.
(*c*) 1 R. & My. 681.
(*d*) 7 Sim. 43. See also *Plenty* v. *West*, 16 Bea. 173; where, however, undue weight appears to have been allowed to the phrase "in the first place": see *Newbegin* v. *Bell*, 23 Bea. 386.
(*e*) 11 Sim. 221; and see *Coote* v. *Coote*, 3 Jo. & Lat. 175

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General conclusion from preceding cases.

are stated in previous editions of the work, and to which *Lance* v. *Aglionby* (*f*) may be added, Mr. Jarman concludes (*g*): "These cases, then, seem to authorise the proposition, that wherever the personal estate is bequeathed in terms as a whole and not as a residue, and the debts, funeral and testamentary charges are thrown on the real estate, this constitutes the primary fund for their liquidation. In [*Jones* v. *Bruce*] the principle was applied to legacies, where the funeral and testamentary charges and debts were thrown on the realty expressly as the primary fund."

But where the personal estate is bequeathed expressly subject to debts and funeral and testamentary expenses, the principle of these cases is of course inapplicable (*h*).

Mere charge insufficient.

And it seems that the principle does not apply unless there is an express trust for payment of debts, and funeral and testamentary expenses; a mere charge of them on the real estate is not sufficient (*i*).

Non-exemption from mere charging of real estate.

"That Sir John Leach did not mean by his preceding adjudications to deny the general rule appears," says Mr. Jarman (*k*), "from the subsequent case of *Rhodes* v. *Rudge* (*l*), where a testator gave all his real and personal estate to A and B upon trust, in the first place, to sell and dispose of the living of C, and the money to arise from the sale thereof to go in discharge of his debts and legacies, and the charges of the trusts thereby created, and if such money were not sufficient to discharge the said debts and legacies, upon trust to cause timber to be felled on his real estates to the amount of £500, to be applied in discharge thereof; and if that should not be sufficient, then upon trust by mortgage or sale to raise such deficiency out of his real estates; and the testator then proceeded to give certain legacies, and appointed A and B executors of his will. Sir J. Leach, V.-C., thought that there was nothing in this will to change the usual order of application, and therefore that the personalty was primarily to be applied (*m*).

(*f*) 27 Bea. 65. See also *Gilbertson* v. *Gilbertson*, 34 Bea. 354; *Powell* v. *Riley*, L. R. 12 Eq. 175. The actual decision in *Powell* v. *Riley* was erroneous: see *Re Ovey*, 51 L. J. Ch. at p. 667.

(*g*) First ed., Vol. II, p. 586.

(*h*) *Paterson* v. *Scott*, 1 D. M. & G. 531. The bequest was of the personal estate "not thereinbefore otherwise disposed of"; as to which see *ante*, p. 2000.

(*i*) *Re Banks*, [1905] 1 Ch. 547.

(*k*) First ed., Vol. II, p. 587. The "preceding adjudications" are *Greene* v. *Greene*, *Michell* v. *Michell*, and *Driver* v. *Ferrand*, *ante*, pp. 2002-3.

(*l*) 1 Sim. 79.

(*m*) The decision seems erroneous, being based on the absence of a gift of the residuary personal estate, *post*, p. 2006. (Note by C. Sweet.)

"No case could well be stronger against the exemption than this; the same persons who were trustees of the real and personal estate were also executors, and there was no other bequest of the personal estate than to these trustees."

Remark on *Rhodes* v. *Rudge.*

(5) *Various Expressions indicating an Intention to exempt Personalty from Primary Liability to Debts, etc.*—Mr. Jarman continues (*n*): "The personal estate is of course held to be exempt from debts where real estate is devised to be sold to pay debts, with a direction that the residue shall *be added to the testator's personal estate* (*o*), which is obviously incompatible with the primary application of the personalty. So where the testator declares that he has charged his lands with the payment of his debts in order that the personal estate may *come clear to the legatee* (*p*).

Residue of real fund *to be added to personalty.*

Personalty to "come clear" to the legatee.

"Again, where the testator charges his debts, funeral and testamentary expenses and legacies, on estate A 'as a primary fund,' and in case that should be deficient, he charges estate B with the deficiency, he thereby conclusively shows that the latter estate is the secondary fund in exoneration of the personal estate" (*q*). So a direction to pay out of the personal estate so much of the debts as the realty previously given for payment of them would not extend to pay, would seem to make the realty primarily liable (*r*). And where a testatrix gave her real estate in moieties to her two daughters M. and S. and their families, and by codicil directed certain debts to be "exclusively and in the first instance" paid out of the M. moiety, her intention being that the S. moiety should be exempt from payment of them, it was held by Malins, V.-C., that the personal estate was exonerated from these particular debts (*s*). The case of *Kilford* v. *Blaney* (*t*) has been already stated (*u*).

Estate made *secondary* fund in exoneration of personalty.

Personalty to pay in aid of realty.

(6) *Where Personalty is undisposed of—Exoneration in Favour of Next-of-kin.*—The exemption of the personalty in

Effect where bequest of exempted personalty fails;

(*n*) First ed., Vol. II, p. 587.

(*o*) *Webb* v. *Jones*, 2 B. C. C. 60, 1 Cox, 245; *M'Cleland* v. *Shaw*, 2 Sch. & L. 538. And see 1 Jo. & Lat. 365, 366; 12 Bea. 505. As to *Wythe* v. *Henniker*, 2 My. & K. 635, see *Webb* v. *Jones*, *supra*. The cases now under discussion must be distinguished from those in which the proceeds of the realty are directed to be added to the personalty, so as to create a mixed fund: *ante*, p. 1979, n. (*f*).

(*p*) *March* v. *Fowke*, Finch, 414.

(*q*) *Dawes* v. *Scott*, 5 Russ. 32. See also *Bateman* v. *Earl of Roden*, 1 Jo. & Lat., at p. 366; *Evans* v. *Evans*, 17 Sim., at p. 106; *Bessant* v. *Noble*, 26 L. J. Ch. 236.

(*r*) *Semb.*, see *Wills* v. *Bourne*, L. R. 16 Eq. 487.

(*s*) *Forrest* v. *Prescott*, L. R. 10 Eq. 545.

(*t*) 31 Ch. D. 56.

(*u*) *Ante*, p. 1994.

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favour of a legatee does not necessarily extend to the next-of-kin, in case of the failure of the bequest by lapse or otherwise. Thus it was laid down by Sir R. P. Arden in *Waring* v. *Ward* (*x*), that if an estate be given to A, subject to debts, and the personal estate to B, exempt from debts, that exemption is to be considered as intended only for the benefit of B, and not as a general exemption of the personal estate.

—where personalty originally undisposed of.

On the other hand, where a testator directed that his personal estate should not be applied in payment of mortgages, and gave the mortgaged estates to different persons, they paying out of them the mortgages, but made no disposition of the personalty, it was held that the devisees took the estates *cum onere* even as against the next-of-kin (*y*).

The distinction is that if there is no particular bequest of the personal estate, and yet the testator exonerates it, it is impossible to say that he intended that exoneration for the benefit of any particular person or object, and he must be taken to have intended that the exoneration should enure for the benefit of the persons, whoever they might be, upon whom the personal estate might devolve (*z*).

Distinction between a general charge of *legacies* and a trust to pay certain sums.

(7) *Charge of Specific Sums.*—Mr. Jarman continues (*a*): "It has been already stated that under a general charge of or a trust to pay *legacies*, the several funds liable to their liquidation are applied in the same order as in the case of *debts*, and therefore the general personal estate, if not exempted, is first applicable (*b*); but such cases are carefully to be distinguished from those in which the trust is to pay certain specified sums, when, *as the only gift is in the direction to pay them out of the land*, that fund alone is liable (*c*).

(*x*) 5 Ves., at p. 676. See *Hale* v. *Cox*, 3 B. C. C. 322; *Noel* v. *Lord Henley*, 7 Price, 241, Dan. 211; *Dacre* v. *Patrickson*, 1 Dr. & Sm., at p. 186; *Kilford* v. *Blaney*, 31 Ch. D. 56. See also *Coventry* v. *Coventry*, 2 Dr. & Sm. 470, where specific parts of the personalty were expressly exempted, and bequeathed to one for life, and afterwards "to fall into the residue" which was also bequeathed. But the report is obscure. The V.-C. is made to rely on *Webb* v. *De Beauvoisin*, 31 Bea. 573, where the question of charging real estate did not arise. Compare *Fisher* v. *Fisher*, 2 Keen, 610. In *Kilford* v. *Blaney* (*supra*), the Court declined to follow *Browne* v. *Groombridge* (4 Madd. 495), so far as that case decided by implication that where the general personal estate is directed to be exonerated out of a specific fund of personalty, the exoneration enures for the benefit of persons taking by lapse.

(*y*) *Milnes* v. *Slater*, 8 Ves., at p. 305.

(*z*) *Per* Kindersley, V.-C., in *Dacre* v. *Patrickson*, 1 Dr. & Sm. pp. 186, 189.

(*a*) First ed., Vol. II, p. 593.

(*b*) *Roberts* v. *Roberts*, 13 Sim., at p. 349; *Ouseley* v. *Anstruther*, 10 Bea. 453; *Davies* v. *Ashford*, 15 Sim. 42; *Boughton* v. *Boughton*, 1 H. L. C. 406, reversing 1 Coll. 26; *Whieldon* v. *Spode*, 15 Bea. 537; *Patching* v. *Barnett*, [1880] W. N. 135.

(*c*) *Whaley* v. *Cox*, 2 Eq. Cas. Ab. 549, pl. 29; *Amesbury* v. *Brown*, 1 Ves. sen., at p. 482; *Phipps* v. *Annesley*, 2 Atk. 57; *Ward* v. *Dudley*, 2

"Thus where a testator devises his estate to trustees, upon trust to sell, and out of the proceeds to pay legacies generally, and afterwards gives to A a legacy of £100, that legacy will be charged upon the land in aid of the personalty only; but if the devise be upon trust to sell, and out of the produce to pay to A £100, the sum so given will be considered as a portion of the real estate, and will in no event be payable out of the personalty; and if the testator sell the estate in his lifetime, the legacy will be adeemed (*d*).

Sums directed to be paid out of specific fund.

"And in *Spurway* v. *Glynn* (*e*), Sir W. Grant thought that a direction at the end of the will, that the personal estate should be applied in payment of *legacies* in exoneration of the real estate, did not apply to a sum given out of a particular estate of which there was no other gift than the trust so to pay it.

Legacy duty, out of what fund payable.

"It seems that in these cases, if the sums in question are bequeathed free from the legacy duty, the duty will be payable out of the same fund as the legacy (*f*).

Trust to pay particular *debts*.

"It does not, however, necessarily follow that the principle above stated applies to trusts for the payment of particular *debts* to which the personal estate was antecedently liable, and with respect to which, therefore, the charging the land would seem to be merely for the purpose of providing an auxiliary fund for those debts, not in order to discharge the personalty.

"The contrary, indeed, seems to have been assumed by Sir W. Grant, in *Hancox* v. *Abbey* (*g*), for he held that a devise of real estate to trustees upon trust to sell, and to pay a mortgage due on some part of the testator's property, subjected the land in the first instance, although the personalty was given 'after payment of debts,' but which his Honor thought might be construed, after payment of debts *not before provided for*.

Br. C. C. 316, 1 Cox, 438, 7 Br. P. C. 566; *Reade* v. *Litchfield*, 3 Ves. 475; *Hartley* v. *Hurle*, 5 Ves., at p. 545; *Brydges* v. *Phillips*, 6 Ves., at p. 571; *Spurway* v. *Glynn*, 9 Ves. 483; *Hancox* v. *Abbey*, 11 Ves. 179; *Aldridge* v. *Wallscourt*, 1 Ba. & Be. 312; *Noel* v. *Lord Henley*, 7 Pri. 241, 12 Pri. 213, Dan. 211, 322; *Rickets* v. *Ladley*, 3 Russ. 418; *Jones* v. *Bruce*, 11 Sim. 221; *Ashby* v. *Ashby*, 1 Coll. 549; *Roberts* v. *Roberts*, 13 Sim., at p. 345; *Evans* v. *Evans*, 17 *ib.*, at p. 102; *Dickin* v. *Edwards*, 4 Hare, 273; *Bessant* v. *Noble*, 26 L. J. Ch. 236. But see *Holford* v. *Wood*, 4 Ves. 76; *Colvile* v. *Middleton*, 3 Bea. 570.

(*d*) *Newbold* v. *Roadknight*, 1 R. & My. 677.

(*e*) 9 Ves. 483.

(*f*) *Noel* v. *Lord Henley*, 7 Pri. 241, Dan. 211. See also *Stow* v. *Davenport*, 5 B. & Ad. 359. But generally a gift of legacy duty is a mere pecuniary legacy, *Farrer* v. *St. Catharine's College*, L. R. 16 Eq., at p. 25; *Re Turnbull*, [1905] 1 Ch. 726. Mr. Jarman's statement of *Welby* v. *Rockcliffe*, 1 R. & M. 571, is omitted.

(*g*) 11 Ves. 179. See as to legacies, *Dickin* v. *Edwards*, 4 Hare, 273.

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Noel v. *Lord Henley.*

"This doctrine and decision, however, are inconsistent with the principle upon which the more recent case of *Noel* v. *Lord Henley* (*h*) was professedly decided."

After stating the case at length, with some comments, Mr. Jarman continues: "The doctrine in the judgment is in direct opposition to that of Sir W. Grant's determination in *Hancox* v. *Abbey*. Upon principle, the distinction taken by that learned Judge, between a trust to pay particular debts and debts generally, seems to be hardly tenable. There is no apparent reason why a testator, who provides an additional fund, should intend to discharge the fund primarily liable, more in the one case than in the other; or why debts, which before subsist as a charge upon the personal estate, independently of the will, should necessarily be considered as governed by the same rule as legacies, which owe their existence to the trust to pay them."

Charge of particular debt *previously* secured on real estate.

It must be observed (*i*) that *Hancox* v. *Abbey* did not depend wholly on the trust being to pay a particular debt, but partly on the fact that the debt in question was already charged on real estate, so that the trust for payment of it was either intended to make the trust fund primarily liable, or was altogether purposeless. After adverting to the general rule that a devise to sell for payment of all debts would not exonerate the personal estate, Sir W. Grant continued: "but a direction to apply a particular portion of the real estate for the payment of one particular debt affords a very different inference. Why should the testator direct exclusively a particular debt to be paid out of his real estate? It is not generally from an apprehension that the personal estate may not be sufficient for all debts, for no precaution is taken except for this particular debt; and this debt was already a charge upon the real estate. Therefore, for the security of the debt, there was no reason to direct a sale. It is no additional security to the mortgagee. For what purpose, then, could he so specially direct a portion of the real estate to be sold, and the produce applied to that particular debt, if he intended that debt to stand just in the same predicament as any other debt, except only that it was to be charged on the real estate as it already was? Putting that aside, nothing is done by all this particularity of expression, for then this debt stands upon the same footing as all other debts" (*k*).

(*h*) 7 Pri. 241, Dan. 211.

(*i*) The rest of this section is taken verbatim from the fourth edition of this work, by Mr. Vincent, Vol. II, p. 677 *seq.*

(*k*) The M.R. also adverted to the form of the gift to B being of the "residue" of the sale moneys. How, he asked, could B claim more than

So, in *Evans* v. *Cockeram* (*l*), where a testator, after devising an estate which he had mortgaged, and giving a power to raise thereout £200 for each of his two daughters, proceeded thus: "And I hereby charge and make liable my said estate for the repayment of the said sums of £200 to each of my said daughters as aforesaid, and also for the payment of any sum or sums of money on the security of my said estate at my death"; Sir J. K. Bruce, V.-C., held that the mortgaged estate was primarily charged with the payment of the debt; observing that in favour of the creditor the testator could not charge the estate or make it more liable than before.

Charge of a particular debt with a personal obligation on devisee.

In *Welby* v. *Rockcliffe* (*m*), where the testator, after devising an estate at W. to A in fee, and reciting a marriage annuity bond given by him, charged the estate, and also A, his heirs, executors and administrators with the payment of the annuity, and then disposed of the personal estate, the residuary personal estate was held to be exempt, though there was no pre-existing charge on the real estate; the annuity not being merely charged on the estate, but the payment being imposed on A as a personal obligation.

Charge of particular debt *without* such personal obligation.

But in *Quennell* v. *Turner* (*n*), where a testator, having on his marriage executed a bond and settlement to secure an annuity to his wife, by his will confirmed the settlement, and charged the annuity on certain real estate and stock, and subject thereto gave the estate and stock to A, and then gave the residue of his real and personal estate, subject as to his personal estate to his debts, funeral and testamentary expenses and legacies, to his wife; it was held by Lord Langdale that the testator had only created a charge without affecting the primary liability of the personal estate.

Demonstrative legacies.

But besides the two classes of legacies already mentioned there is a third or intermediate class, where there is a separate and independent gift of the legacy, and then a particular fund or estate is pointed out as that which is to be primarily liable (*o*). This class would seem to afford a closer analogy to charges of particular debts than legacies that are only specific.

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was given to him? (But that argument would be equally good if the trust were to pay all debts.) Or could the heir be intended to take the benefit as so much undisposed of? (as to which see *ante*, p. 760).

(*l*) 1 Coll. 428. But see *Johnson* v. *Milksopp*, 2 Vern. 112. Since Locke King's Acts (*ante*, p. 1987) the express charge is, in a case like *Evans* v. *Cockeram*, as little needed for the one purpose as for the other.

(*m*) 1 R. & My. 571.

(*n*) 13 Bea., 240.

(*o*) *Per* Wood, V.-C., 1 H. & M., at p. 668. As to the ademption of specific and demonstrative legacies, see *ante*, pp. 1053 *seq.*

Thus in *Lamphier* v. *Despard* (*p*), where a testator directed his debts and legacies to be paid by his brother, and gave to him the woods growing on his estate F. to pay his debts and legacies; then he bequeathed two legacies, which were not to be paid until five years after his death, as it was his wish that the woods should not be cut down until then; he then bequeathed the timber-money after payment of the two legacies, and then gave another legacy, and appointed his brother his executor and residuary legatee; it was held by Sir E. Sugden, C. Ir., that the two legacies were payable primarily out of the produce of the timber, and that the residuary personal estate was the secondary fund for payment of them. He said "This is not a general fund provided for payment of all the legacies, but a fund only for two; and whenever there is a direction to apply a particular fund for the payment of some of the legacies, that is the primary fund for this purpose, *Hancox* v. *Abbey*."

Sir E. Sugden appears indeed to have invariably referred Sir W. Grant's decision to the distinction between a particular and a general charge (*q*). On the other hand there appears to be no decision on that bare point except *Quennell* v. *Turner*, which would seem to involve a denial of any such distinction in the case of debts.

Charge of a particular sum towards payment of debts.

The charging of an estate with a definite sum for payment of debts points more directly to making that estate the primary fund. Personal estate fluctuates, and debts fluctuate, and in no certain ratio to each other. By what amount therefore (if any) the personalty will fail to satisfy the debts is until the testator's death quite uncertain; and to devote a fixed amount to answer this uncertain deficiency is an improbable thing to intend. In *Clutterbuck* v. *Clutterbuck* (*r*), where a testator devised lands upon trust to raise a sum of £2,000 for payment of certain specified debts, and all such other debts as he should owe at his decease; and on further trust out of his rents, etc., to pay divers life annuities, and "subject to the several trusts aforesaid" in trust for his wife for life, remainder to a nephew in fee; it was held by Sir J. Leach, M.R., that the sum of £2,000 was the primary fund.

(*p*) 2 D. & War. 59.

(*q*) *Bateman* v. *Earl of Roden*, 1 Jo. & Lat., at p. 369; *Coote* v. *Coote*, 3 *ib.* 175. In the former case the personalty was held exonerated from a debt on the ground that it was consolidated with another sum which was clearly charged on the real estate only. *Hancox* v. *Abbey* is referred to in *Bickham* v. *Cruttwell*, 3 My. & C. 763, but in that case the question was one of exoneration before Locke King's Act. As to the result where the testator excludes Locke King's Act by providing a special fund for payment of mortgage debts which is insufficient for the purpose, see *Corballis* v. *Corballis*, 9 L. R. Ir. 309, and other cases cited *ante*, p. 1990.

(*r*) 1 My. & K. 15.

(8) *Effect of charging a Specific Fund with Debts, etc.*—"It should seem," says Mr. Jarman (*s*), "that where a specific portion of *personal* estate is appropriated to charges to which the general personalty is liable, such fund is not, as in the case of land, subsidiary only, but is primarily applicable.

Where *personal* fund is subjected to certain charges.

"Thus, in the case of *Browne* v. *Groombridge* (*t*), where a testator gave to his executors his Exchequer bills, money at the bankers and due to him on policies of insurance, money in the funds, and debts, upon trust thereout to pay his wife £200, and then *to pay his debts, funeral and testamentary expenses*, and, after making the said payments, to pay certain legacies, and then to stand possessed of the moneys upon certain trusts; it was contended, on the authority of *Waring* v. *Ward*, and *Noel* v. *Lord Henley*, that the specific fund was charged with the debts and legacies only in aid of the personal estate; but Sir J. Leach, V.-C., held, that the fund was immediately liable, observing that *Waring* v. *Ward* was the case of a devisee of real estate, who was entitled to the aid of the personal estate.

General personalty held to be exempt.

"So, in *Choat* v. *Yeats* (*u*), where a testatrix gave the residue of her *funded property*, after payment of her *just debts, legacies, funeral and testamentary expenses*, to A, and all the residue of her personal estate upon certain trusts; it was held that the funded property was primarily liable, though the effect was to leave nothing for the legatee.

"Again, in *Bootle* v. *Blundell* (*x*), we have seen that the direction to pay the funeral expenses and certain legacies out of a specified fund was treated by Lord Eldon as tantamount to a declaration that they should not be paid out of the general personal estate.

"But a different construction prevailed in the anterior case of *Holford* v. *Wood* (*y*), where a testatrix bequeathed certain leasehold hereditaments, household goods, furniture, and personal estate, then late belonging to W., to F., his executors, etc., for his own use and benefit, *subject to the payment of 'the following annuities and legacies.'* The testatrix then specified

Contrary doctrine in *Holford* v. *Wood*.

(*s*) First ed., Vol. II, p. 598.

(*t*) 4 Mad. 495. In this case "testamentary expenses" was held not to include the costs of an administration suit. But this has been otherwise determined, *Harloe* v. *Harloe*, L. R. 20 Eq. 471, and cases cited *ante*, p. 1968.

(*u*) 1 J. & W. 102; and see *Evans* v. *Evans*, 17 Sim., at p. 106; *Phillips* v. *Eastwood*, 1 Ll. & G. *t. Sugd.* 294; *Webb* v. *De Beauvoisin*, 31 Bea. 573; *Vernon* v. *Earl Manvers*, *ib.* 623; *Longfield* v. *Bantry*, 15 L. R. Ir. 101; *Trott* v. *Buchanan*, 28 Ch. D. 446.

(*x*) 1 Mer. 193. The statement of *Bootle* v. *Blundell* (covering more than four pages), in the first edition of this work, has been omitted in the present edition.

(*y*) 4 Ves. 76.

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certain legacies and annuities, and appointed F. executor. One question was, whether the specific property was liable to the legacies and annuities in the first instance, or only in aid of the general personal estate. Sir R. P. Arden, M.R., held that the specific fund was *not* primarily charged: his Honor adverting to the hardship of making legatees liable to lose their legacies, if the fund upon which they were specifically charged was deficient.

Remarks on case of *Holford* v. *Wood*.

"Admitting that, in this case, the legacies were not payable out of the specific fund *alone* (*z*); yet it is clear, according to the doctrine *now* established by *Browne* v. *Groombridge*, and *Choat* v. *Yeats*, that even if the legacies were general, the fund charged, being personal, was primarily applicable. In regard to this point, the case may be considered as overruled by the two last-mentioned authorities, in which unfortunately it was not cited. The doctrine of those authorities seems upon the whole to be the more reasonable; for, although, where a testator subjects real estate to charges to which the personal estate, and most frequently that only, was before liable, there is no reason why the added fund should be applied before the original one, yet in regard to personal property, the whole of which was antecedently applicable to debts, as additional security to the creditor could not be the object of the provision, the natural inference is, that the testator, in appropriating for this purpose a particular portion of that estate, intended that it should be primarily applied."

It will be noticed that in *Holford* v. *Wood* the general residue was undisposed of, and in several cases this circumstance appears to have affected the construction (*a*). But it is submitted that it ought not to do so, and that the whole question is whether the testator intended the special fund to be liable primarily or only as an auxiliary to the general personal estate. This principle was acted on in *Re Grainger* (*b*). In that case, the Court of Appeal having held that a specific fund was expressly given subject to the payment of certain legacies (*c*), it was contended that the legacies were primarily payable out of the general personal estate, which was undisposed of; the Court held that there was no foundation for the claim, and that

Re Grainger.

(*z*) See cases collected *ante*, p. 2006.

(*a*) *Howse* v. *Chapman*, 4 Ves. 542; *Rhodes* v. *Rudge*, 1 Sim. 79; *Hewett* v. *Snare*, 1 De G. & S. 333; *Newbegin* v. *Bell*, 23 Bea. 386; *Corbet* v. *Corbet*, Ir. R. 8 Eq. 407; *Re McMorren* [1917] 1 Ir. R. 278; *Duffy* v. *Duffy*, [1920] 1 Ir. R. 122. See the remarks of Sugden, L.C., in *Phillips* v. *Eastwood*, Ll. & G. *t. Sugd.*, at p. 294.

(*b*) [1900] 2 Ch. 756.

(*c*) The decision of the C. A. on this point was reversed in D. P. (*Higgins* v. *Dawson*), [1902] A. C. 1; see *ante*, p. 1033.

the circumstance that the general personal estate was undisposed of was irrelevant.

Lapse, etc.

But if there is a gift of the general residue which fails by reason of lapse or otherwise, the doctrine of *Browne* v. *Groombridge*, *Choat* v. *Yeats*, and the other cases cited above, does not apply (*d*).

Charge on a particular fund, and exemption of the others, do not alter liability of others *inter se*.

Where one particular fund is appropriated for payment of debts and the testator's other property is exempted, such other property still remains liable in its proper order for any deficiency, the exemption not having the effect of altering the liabilities of the several species of exempted property *inter se*. Thus in *Lord Brooke* v. *Earl of Warwick* (*e*), the testator devised real estates in mortgage and bequeathed specific parts of his personal estate and also the residue of his personal estate "freed and discharged from debts, etc.," and devised an estate to be sold and the money to be applied to pay his debts, etc. The money arising from the sale proving insufficient for the purpose, it was contended that the gift of the residue was in the nature of a specific gift, and there being the same expressed intention to exonerate the residue, as to exonerate the mortgaged estates, from debts, the devisees of the latter ought to take *cum onere*; but Lord Cottenham, C., affirming the decision of Sir J. K. Bruce, V.-C., held that the residue was primarily liable. The V.-C. said he could conceive a case in which a residuary bequest might stand on an equal footing with particular or specific legacies; but here he thought the testator meant no more than that the property expressly given in trust for payment of the debts should be the only fund or the first fund for their payment. The L.C. approved of the V.-C.'s construction, and said both the mortgaged estate and the residue were intended by the testator to be freed from the debts (referring particularly to the passage cited above); but that he could not give the residue discharged from debts unless he provided for them out of some other fund.

Secus, where part only of the others is exempted.

But where all the personalty is bequeathed in terms expressly exempting it from payment of the usual charges affecting it, this exemption throws those charges on all other property not expressly exempted, so that, for instance, in case of a deficiency in the produce of lands devised to answer such charges, they

(*d*) *Kilford* v. *Blaney*, 31 Ch. D. 56; *Re Williams*, 59 L. T. 310. It is curious that in *Browne* v. *Groombridge* it seems to have been assumed that the general doctrine applied in cases of lapse, etc., but so far as it so decided *Browne* v. *Groombridge* is overruled.

(*e*) 2 De G. & S. 425, affirmed 1 H. & Tw. 142. See also *Colvile* v. *Middleton*, 3 Bea. 570.

would fall upon other lands specifically devised (*f*). And in *Powell* v. *Riley* (*g*), where the exemption of the personal estate was not express, but was inferred from its being given as a specific legacy, and where the property expressly given for payment of the debts, funeral and testamentary expenses proved insufficient, the personal estate was held liable to pay only a proportion of the deficit *pari passu* with specifically devised lands. This is the case contemplated by Sir J. K. Bruce in *Lord Brooke* v. *Earl of Warwick*, which, however, was not cited.

Distinction between debts and legacies.

(9) *Legacies and Annuities.*—In many of the cases cited in the preceding sub-divisions of this section, the decision was that the general personal estate was exonerated from legacies (or annuities) as well as from debts, etc., but the term "exoneration," as applied to legacies and annuities, is not always used in the same sense as when applied to debts. There is an obvious distinction with regard to this question between debts and legacies; "a creditor has a claim by operation of law; but a legatee can only claim his legacy in the manner and form in which it is given by the will" (*h*). Consequently, where a testator makes his real estate primarily liable for his debts, this is necessarily a case of exoneration, but if he directs a sum of money to be raised out of his real estate (or out of a specific part of his personal estate), and then bequeaths that sum, the real estate (or specific personalty) is alone liable; no question of exoneration arises, because the general personal estate was never onerated. Such a bequest is really a specific legacy (*i*).

Implied exemption.

Even where there is a direct bequest of legacies or annuities —which would *prima facie* make them payable out of the general personal estate—an intention to make them payable exclusively out of specific real or personal property may appear from the context. Thus in *Ion* v. *Ashton* (*k*), the testator bequeathed certain legacies and annuities and charged some of them on his lands at H., and the rest on his lands at O., and devised the estates so subject, one to A, and the other to B.

(*f*) *Morrow* v. *Bush*, 1 Cox, 185; *Young* v. *Young*, 26 Bea. 522.

(*g*) L. R., 12 Eq. 175, see *ante*, p. 2004.

(*h*) *Per* Shadwell, V.-C., in *Jones* v. *Bruce*, 11 Sim. at p. 227. The meaning of "exoneration" was discussed in *Re Rossiter*, 13 Ch. D. 355.

(*i*) *Hancox* v. *Abbey*, 11 Ves. 179; other cases are *Gray* v. *Minnethorpe*, 3 Ves. 103 (citing *Hone* v. *Medcraft*, 1 Br. C. C. 261); *Hartley* v. *Hurle*, 5 Ves. 540; *Brydges* v. *Phillips*, 6 Ves. 567; *Dawes* v. *Scott*, 5 Russ. 32 (stated *ante*, p. 2005); *Jones* v. *Bruce*, 11 Sim. 221; *Dickin* v. *Edwards*, 4 Ha. 273; *Bessant* v. *Noble*, 26 L. J. Ch. 236.

(*k*) 28 Bea. 379; *Re Needham*, 54 L. J. Ch. 75, was a somewhat similar case. See also *Lomax* v. *Lomax*, 12 Bea., at p. 290; *Woodhead* v. *Turner*, 4 De G. & S. 429. *Roberts* v. *Roberts*, 13 Sim. 336; *Rhodes* v. *Rudge*, 1 Sim. 79, *ante*, p. 2004; *post*, n. (*n*). In *Gittins* v. *Steele*, 1 Sw. 24, the general personal estate was expressly exempted.

He then gave all his personal estate to trustees on trust to convert and pay debts and funeral and testamentary expenses, and the expenses of proving his will and the costs of converting his personal estate, and to pay the residue to a charity. Romilly, M.R., held that the effect was to lay upon the real estate certain charges which were specified, and then to give it subject thereto, and on the personal estate to lay other charges, and then give it subject thereto, and therefore that the annuities and legacies were charged exclusively on the real estate.

But the term "exoneration" is sometimes applied to cases of this kind (*l*).

Exoneration of legacies in strict sense.

In the strict sense of the term, as has been already pointed out (*m*), "exoneration," as applied to legacies and annuities, implies that they are payable out of the general personal estate, but that the testator has made some specific part of his real or personal estate primarily liable for their payment, so that they are not payable out of the general personal estate unless the primary source is insufficient; in such a case the legacies or annuities are demonstrative (*n*).

A similar result follows where the testator directs the proceeds of his real estate to be applied "in part payment" of certain legacies; which is equivalent to "in payment as far as the proceeds will extend" (*o*).

There is also an intermediate class of cases, where legacies and annuities are payable out of the residuary real and personal estate, *pari passu* (*p*).

Rights of creditors —against executor;

VIII.—Payment of Legacies and Shares of Residue.—As a general rule, if an executor distributes the estate of his testator among the legatees and other beneficiaries before all the debts and liabilities are paid or satisfied, he is personally liable to the unpaid creditors (*q*). But under Lord St. Leonard's Act (Law of Property Act, 1859), s. 29 (*r*), an executor who issues proper advertisements to creditors is justified in distributing the estate after satisfying or providing for all claims of which he has notice, without prejudice to the right of the creditors to follow the

—against beneficiaries.

(*l*) *Lance* v. *Aglionby*, 27 Bea. 65, *ante*, p. 2004; *Re Needham*, 54 L. J. Ch. 75.

(*m*) *Ante*, p. 1997.

(*n*) *Boughton* v. *Boughton*, 1 H. L. C. 406; *Kilford* v. *Blaney*, 31 Ch. D. 56. This construction was adopted in the cases of *Browne* v. *Groombridge* and *Choat* v. *Yeats*, stated *ante*, p. 2011, where *Holford* v. *Wood* and *Re Grainger* are also referred to. The case of *Rhodes* v. *Rudge*, 1 Sim. 79, which seems to have been erroneously decided, is stated *ante*, p. 2004.

(*o*) *Bunting* v. *Marriott*, 19 Bea. 163; *Guiry* v. *Condon*, [1918] 1 Ir. R. 23 (proceeds of sale of chattel real).

(*p*) *Ante*, p. 2009.

(*q*) Robbins and Maw, 423 *et seq.*

(*r*) Now replaced by section 27 of the Trustee Act, 1925.

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Liabilities under leases.

assets into the hands of the beneficiaries (*s*). Under the same Act (sections 27, 28 (*t*)), where leasehold or freehold land belonging to a testator has been sold, the executor is protected from personal liability in respect of future claims for rent, etc., and is only bound to provide for " any fixed and ascertained sums " which the testator was liable to lay out on the property; the assets of the testator, however, still remain liable in the hands of beneficiaries.

Section 27 of the Trustee Act, 1925.

Now under section 27 of the Trustee Act, 1925 (*u*), as amended by the Schedule to the Law of Property (Amendment) Act, 1926, after giving the requisite notices, the personal representatives may convey or distribute the property to or among the persons entitled thereto having regard only to the claims of which the personal representatives then had notice.

Liabilities under leases.

On making an order for the distribution of the estate of a testator amongst his residuary legatees the Court will not set aside any part of the assets to indemnify the executors against possible liabilities in respect of leases formerly held by him unless there is privity of estate between the executors and the lessors (*x*).

Transfer of specific legacies.

It may be mentioned that when executors assent to specific legacies of shares or mortgages, the costs of transfer, including the executors' own costs in connection therewith, are borne by the specific legatees (*y*).

The executor's year.

The personal representatives need not distribute before the expiration of one year from the death (*z*), but they are not bound to wait a year before paying a legacy (*a*).

Abatement of pecuniary legacies.

Abatement of Legacies and Annuities.—If the fund for the payment of pecuniary legacies (*b*) (and in this context the word includes annuities) is insufficient for the payment of them in full, they, *prima facie*, abate rateably *pari passu* (*c*). It may here be mentioned that if a legacy is given free of duty, such duty is a pecuniary legacy which is liable to abatement with the other pecuniary legacies (*d*). The profit costs of a

(*s*) Robbins and Maw, 452.

(*t*) Now replaced with amendments by section 26 of the Trustee Act, 1925.

(*u*) Which replaces with amendments section 29 of the Law of Property (Amendment) Act, 1859.

(*x*) *Re Nixon*, [1904] 1 Ch. 638; *Re Sales*, 64 Sol. J. 308.

(*y*) *Re Grosvenor*, [1916] 2 Ch. 375; *Re De Sommery*, [1912] 2 Ch. 622; *Re Scott*, [1914] 1 Ch. 592.

(*z*) Section 44 of the Administration of Estates Act, 1925.

(*a*) *Re Palmer*, [1916] 2 Ch. 391, at p. 401.

(*b*) See *ante*, p. 1976.

(*c*) *Barton* v. *Cooke*, 5 Ves., at p. 464; *Re Tootal's Estate*, 2 Ch. D. 628.

(*d*) *Farrer* v. *St. Catharine's College, Camb.*, L. R. 16 Eq. 19; *Re Turnbull*, [1905] 1 Ch. 726.

solicitor executor or trustee, who is entitled to charge, abate with the other pecuniary legacies (*e*).

Demonstrative legacies.

Demonstrative legacies (*f*) are in the first place payable out of the specific fund allocated for their payment (*g*), but if this fund is insufficient, the unpaid portions become general legacies and abate with the other general legacies if there is a deficiency (*h*).

Specific legacies.

Specific legacies, too, abate rateably *inter se* (*i*); but where specific legacies were given "as general and not as specific legacies," it was held that they abated together with the general pecuniary legacies (*k*).

If the general estate is insufficient for payment of debts, specific and demonstrative legacies abate rateably (*l*).

Where a testator disposes of a particular fund by giving legacies of fixed amount out of it to various persons, and the fund is insufficient, the legatees abate among themselves (*m*). So if the bequests are of stock (*n*). If the testator states that the fund amounts to a particular sum, and gives specific amounts to one or more persons, and the residue or surplus to another, the gift of the residue is, as a general rule, treated as a specific gift of what it would have been if the fund had produced the amount stated by the testator (*o*). But if the testator treats the fund as of uncertain amount, or makes it subject to payments of uncertain amount (such as debts or expenses), the general rule does not apply (*p*). A testator may, however, so deal with a fund of uncertain amount as to show that the gift of the residue of it is not to include such parts of it as are bequeathed upon trusts which fail (*q*).

(*e*) *Re Brown*, 62 Sol. J. 487; *Re Salmon*, 107 L. T. 108 (salary of executor trustee for managing a business). If the estate is insolvent he gets no profit costs: *Re White*, [1898] 2 Ch. 217.

(*f*) See *ante*, p. 1031.

(*g*) *Acton* v. *Acton*, 1 Mer. 178.

(*h*) *Mullins* v. *Smith*, 1 D. F. & S. 204; *Tempest* v. *Tempest*, 7 D. M. & G. 470.

(*i*) *Clifton* v. *Burt*, 1 P. W., at p. 680; *Duke of Devon* v. *Atkins*, 2 P. W. 381; *Re Boyd* (*Boyd* v. *Boyd*) [1928] N. Ir. 14.

(*k*) *Re Compton*, [1914] 2 Ch. 119.

(*l*) *Re Turner*, [1908] 1 Ir. R. 274.

(*m*) *Page* v. *Leapingwell*, 18 Ves. 463, *ante*, p. 1013; *Humphreys* v. *Humphreys*, 2 Cox, at p. 186; *Wright* v. *Weston*, 26 Bea. 429; *Haslewood* v. *Green*, 28 Bea. 1; *Harley* v. *Moon*, 1 Dr. & S. 623; *Walpole* v. *Apthorp*, L. R. 4 Eq. 37; *Baker* v. *Farmer*, L. R. 3 Ch. 537. In *Re Tunno*, 45 Ch. D. 66, the testatrix bequeathed two legacies out of a fund which would have been insufficient to meet both of them; one legacy failed, and it was held that the other legatee was entitled to be paid in full. Compare the cases on abatement of sums appointed under powers, *ante*, p. 822.

(*n*) *Sleech* v. *Thorington*, 2 Ves. sen. 560; *Elwes* v. *Causton*, 30 Bea. 554.

(*o*) See the cases cited *ante*, note (*m*). As to the case where the fund is wasted after the testator's death, see *Ex p. Chadwin*, 3 Sw. 380.

(*p*) *Harley* v. *Moon*, 1 Dr. & S. 623; *Re Tunno*, 45 Ch. D. 66. See also the cases cited *ante*, p. 835.

(*q*) *Fee* v. *M'Manus*, 15 L. R. Ir. 31.

CHAPTER LIV.

Abatement prevented by terms of will.

In *Evans* v. *Harris* (*r*) the testatrix gave £11,000 stock upon trust for S. until some child of his should attain twenty-one and when and as his children attained twenty-one upon trust to pay or transfer to each such child £1,000 stock: it seems that there might not eventually be sufficient stock to provide for all S.'s children, but Lord Langdale held that the directions of the will must be followed, and that each child as it attained twenty-one was entitled to £1,000 stock, although the result might be that the later born children would take nothing.

Effect of devastavit.

In *Richardson* v. *Morton* (*s*) the testator gave certain legacies including a legacy to an infant, payable at twenty-one, with maintenance in the meantime, and charged certain lands with the payment of so much of his debts, legacies, etc., as his personal estate should be inadequate to discharge; the personal estate was sufficient for all the purposes of the will at the time of the testator's death, but was subsequently wasted by the executor; Romilly, M.R., held that the legatee was not entitled to have his legacy charged on the realty. But there are Irish decisions to the contrary (*t*). Of course if the executor is also devisee of the land, he cannot be heard to say that the land is not charged because the personal estate was originally sufficient (*u*).

Default of creditor.

When the personal estate was sufficient, and a creditor lost his right against the executors by his own default, he could not come on the realty (*x*); he had to follow the personal estate into the hands of the persons among whom the executors had distributed it.

Waste of assets.

It was at one time supposed that if the assets were wasted by the executor, or otherwise lost after the death of the testator, the general and residuary legatees ought to abate rateably, but this is clearly not so, and in such a case the loss falls on the residuary legatee (*y*), unless the general legatees have assented to their legacies being mixed with the residue as one common

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(*r*) 5 Bea. 45. As to the time for ascertaining the class in a case of this kind, see *ante*, p. 1650.

(*s*) L. R. 13 Eq. 123. See *Hepworth* v. *Hill*, 30 Bea. 476; *Tatlock* v. *Jenkins*, Kay, 654.

(*t*) *Re Massy's Estate*, 14 Ir. Ch. 355; *M'Carthy* v. *M'Cartie*, [1897] 1 Ir. R. 86: in this case, however, the point did not really arise: *Bank of Ireland* v. *McCarthy*, [1898] A. C. 181.

(*u*) *Humble* v. *Humble*, 2 Jur. 696; *Howard* v. *Chaffers*, 2 Dr. & S. 236; *Re Bradford's Estate*, [1895] 1 Ir. R. 251.

(*x*) *Trousdale* v. *Hayes*, [1883] W. N. 13.

(*y*) *Dyose* v. *Dyose*, 1 P. W. 305; *Fonnereau* v. *Poyntz*, 1 Br. C. C., at p. 478; *Humphreys* v. *Humphreys*, 2 Cox, 184; *Ex p. Chadwin*, 3 Sw. 380; *Baker* v. *Farmer*, L. R. 3 Ch. 537.

fund, in which case any loss which happens to it must be borne by the general and residuary legatees rateably (*z*).

Deficiency arising after some legacies paid.

If the assets were originally sufficient to satisfy all the legacies, and the executor pays some of them, and afterwards wastes the estate so as to make it insufficient, the unpaid legatees cannot oblige the satisfied legatees to refund (*a*). Nor, *a fortiori*, can they do so when the loss has arisen without any fault of the executor (*b*). But if the assets were originally deficient, an executor who pays a legacy in full is guilty of a devastavit, and the legatee is therefore liable to refund (*c*).

The same rules apply to shares of residue (*d*).

Accession to assets.

On the general principle above stated (namely, that the residuary legatee takes nothing until all the general legatees are paid), if further assets come in, or if a fund falls in on the cesser of an annuity, or the like, after an abatement, the general legatees get the benefit of the accession until they have been paid in full (*e*). Sometimes, however, a testator inserts an express direction that if his estate is insufficient to pay all the legacies in full, they shall abate proportionately, and then the question arises whether the abatement is intended to be permanent; for example, if the legacies abate in accordance with the direction, and afterwards a fund falls in (as by the failure of a contingent legacy or the like), the question is whether it goes to the residuary legatee or whether it ought to be applied in making up the legacies to their proper amounts. The balance of authority seems to be in favour of the former conclusion (*f*).

Priority of legacies.

Priority of Legacies.—If a general legacy has priority over the others, it does not abate with them, but is entitled to be paid in full before they receive anything. Thus a legacy given in satisfaction of dower has priority, if the right to dower exists at the testator's death, and if the testator left real estate of which the widow is dowable (*g*).

Legacy in lieu of dower.

Legacy for valuable consideration.

The rule with regard to legacies in lieu of dower is generally considered to be an illustration of a general principle, which has been thus stated. "When a general legacy is given in

(*z*) *Ex p. Chadwin*, 3 Sw. 380. Compare *Re Campbell*, [1893] 3 Ch. 468, *post*, p. 2027.

(*a*) Roper, 459.

(*b*) *Fenwick* v. *Clarke*, 4 D. F. & J. 240; *Re Hurst*, 67 L. T. 96.

(*c*) Roper, 459.

(*d*) *Peterson* v. *Peterson*, L. R. 3 Eq. 111; *Re Winslow*, 45 Ch. D. 249; *Re Lepine*, [1892] 1 Ch. 210.

(*e*) *Willmott* v. *Jenkins*, 1 Bea. 401.

(*f*) *Farmer* v. *Mills*, 4 Russ. 86; *Hichens* v. *Hichens*, 36 L. T. 8. In *Re Lyne's Estate*, L. R. 8 Eq. 482, Stuart, V.-C., held that the fund which fell in went to the general legatees whose legacies had abated.

(*g*) See *ante*, p. 1083.

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consideration of a debt owing to the legatee, or of his relinquishing any right or interest, since the bequest is not made as a bounty, like other general bequests, but as purchase-money for the collateral right or interest, it will be entitled to a preference of payment to the other general legacies, which are merely voluntary" (*h*).

In satisfaction of a debt.

As regards the first part of this proposition, the rule does not seem to be of great practical importance, for the legatee has no priority unless he can prove the existence of a debt (*i*): and if a testator who owes A £1,000 bequeaths £3,000 to him in satisfaction of the debt, and A elects to take the legacy, it is liable to abatement with the other legacies (*k*). Where a legacy was given on condition of the legatee releasing certain claims, it was held that if she elected to take the legacy, it would abate with the other legacies (*l*).

Intention to give legacy priority.

As a general rule, legacies are payable *pari passu*, in whatever order they appear in the will (*m*); and no legacy has priority unless a clear intention appears (*n*). It is immaterial that the legacies are made payable at different dates or periods (*o*), or are given in succession, some being payable "in the first place," or "in the next place," and others "afterwards" (*p*). But where a testator distinguishes between legacies given generally, and legacies given out of residue (meaning what is left after the former legacies have been paid), this shows an intention that the legacies given generally shall have priority (*q*). So where a testator directs a sum to be set apart for the benefit of certain persons, and then directs that the "residue" of his personal estate shall be invested and held on certain trusts, and afterwards bequeaths pecuniary legacies, the first-named sum takes priority over all the other gifts (*r*).

(*h*) Roper, 431, cit. *Blower* v. *Morret*, 2 Ves. sen. 422, and the cases on legacies in lieu of dower, *ante*, p. 1083.

(*i*) *Davies* v. *Bush*, Yo. 341. See *Coppin* v. *Coppin*, 2 P. W., at p. 296, where the testator had compounded with his creditors. A direction to pay the debts of another person is merely an ordinary legacy: *Shirt* v. *Westby*, 16 Ves. 393.

(*k*) *Re Wedmore*, [1907] 2 Ch. 277.

(*l*) *Re Whitehead*, [1913] 2 Ch. 56.

(*m*) *Whitehouse* v. *Insole*, 7 L. T. 400.

(*n*) *Miller* v. *Huddlestone*, 3 Mac. & G. 513.

(*o*) *Nickisson* v. *Cockill*, 3 D. J. & S. 622.

(*p*) *Blower* v. *Morret*, 2 Ves. sen. 420; *Beeston* v. *Booth*, 4 Madd. 161; *Thwaites* v. *Foreman*, 1 Coll. 409; 10 Jur. 483; *Street* v. *Street*, 2 N. R. 56; *Re Harris*, [1912] 2 Ch. 241.

(*q*) *Haynes* v. *Haynes*, 3 D. M. & G. 590; *Re Smith*, [1899] 1 Ch. 365; *Browne* v. *Malone* (*Re Malone*), [1897] 1 Ir. R. 571. In *Eavestaff* v. *Austin*, 19 Bea. 591, a testatrix by her will gave a legacy "out of the residue of her property"; and by a codicil she gave another legacy "out of the residue of her estate, in case there should be sufficient": it was held that the two legacies were payable *pari passu*.

(*r*) *Gyett* v. *Williams*, 2 J. & H. 429.

In *Re Colville* (*s*), the testatrix on the death of her sister (to whom she had given a life interest) gave certain annuities and legacies and directed her trustees to set apart investments to provide for the annuities, and "subject thereto" gave them more legacies. Held, that all the legacies payable on the sister's death ranked *pari passu*; the estate was insufficient to meet them all after setting aside a fund to meet the annuities.

In *Re Delevigne* (*t*) the testator, who died September 30, 1888, gave certain charitable legacies and certain legacies to individuals out of the proceeds of sale of his real and personal estate and directed that his charitable legacies should be paid exclusively out of such part of his personal estate as might be legally bequeathed for charitable purposes. Peterson, J., held that the charitable legacies were not entitled to be paid in full out of the pure personalty before the non-charitable legacies, but could only claim that the non-charitable legacies should exhaust the realty before they could participate in the pure personalty.

In *Re Hardy* (*u*) the testator directed his trustees "in the first place" to raise and invest certain sums upon trust for his wife and brother and sisters during their lives, and also bequeathed various pecuniary legacies to his brothers and sisters and other persons absolutely: it was held by Malins, V.-C., that there was such a "marked distinction" between the legacies in which life interests only were given and those given absolutely, that the former had priority, but the learned judge seems to have been influenced by guesses as to what the testator would have desired if he had foreseen that his estate would prove insufficient. The same notion appears in some of the older cases, where legacies for the maintenance of the testator's wife and children, who would have been otherwise unprovided for, have been held to be entitled to priority on the theory that such a provision is a duty which the testator owes to nature (*x*), but this theory is not now allowed to influence the construction of wills (*y*).

Immediate legacy to wife.

Accordingly a legacy to the testator's wife, to be paid immediately, or within a short time after the testator's death, or expressed to be for her immediate requirements, has no priority (*z*).

(*s*) 105 L. T. 622.
(*t*) [1916] W. N. 235.
(*u*) 17 Ch. D. 798; *Re Leach*, [1923] 1 Ch. 161.
(*x*) *Lewin* v. *Lewin*, 2 Ves. sen. 415; *Blower* v. *Morret*, *ibid.*, 420.
(*y*) *Re Schweder's Estate*, [1891] 3 Ch. 44; *Cazenove* v. *Cazenove*, 61 L. T. 115.
(*z*) *Ibid.*

CHAPTER LIV.

Bequest conditional on sufficiency of assets.

If a testator bequeaths two sets of legacies, and clearly shows that he intends the second set to be paid only in the event of there being a surplus after payment of the first set, the first set has priority (*a*).

Executor.

A legacy to an executor for his care and pains has no priority (*b*).

Annuities.

Annuities.—It has been already mentioned (*c*) that annuities are for most purposes treated as general legacies. Annuitants have therefore the same right of priority over the residuary legatee as general legatees and in case of deficiency of assets annuities abate rateably with general legacies (*d*).

Calculation of value.

For the purpose of abatement, where an annuity is payable from the testator's death, and the annuitant is living when the deficiency of assets is ascertained, the present value of the annuity is calculated, and the arrears are added to it (*e*). If the annuitant is dead, the value is the amount which he would have actually received if the fund had not been deficient (*f*). In the case of a reversionary annuity, if the deficiency is ascertained at the death of the testator, the value of the annuity is calculated on the basis of its being a reversionary interest (*g*). But if the annuity falls into possession before the deficiency is ascertained, its present value is calculated at the time when the deficiency is ascertained, and any arrears since it fell into possession are added (*h*). Where there are two annuities, one payable from the death of the testator, and the other payable from a future time, and the deficiency is not ascertained for some years after the testator's death, during which time the immediate annuity is paid in full, that annuitant is not bound to bring the sums received by him into hotchpot in calculating the values of the two annuities (*i*).

Where annuities are given out of and charged on a fund

(*a*) Roper, 429; *Att.-Gen.* v. *Robins*, 2 P. W. 23; *Stammers* v. *Halliley*, 12 Sim. 42; *Beeston* v. *Booth*, 4 Madd., at p. 170; *Brown* v. *Brown*, 1 Keen, 275; *Re Olivieri*, 56 Sol. J. 613.

(*b*) *Att.-Gen.* v. *Robins*, 2 P. W., at p. 25; *Duncan* v. *Watts*, 16 Bea. 204; *Fretwell* v. *Stacy*, 2 Vern. 434; *Heron* v. *Heron*, 2 Atk. 171.

(*c*) *Ante*, p. 1022.

(*d*) *Hume* v. *Edwards*, 3 Atk. 693; *Miller* v. *Huddlestone*, 3 Mac. & G. 513. See *Anderson* v. *Anderson*, 33 Bea. 223; *Re Cottrell*, [1910] 1 Ch. 402.

(*e*) *Heath* v. *Nugent*, 29 Bea. 226. *Re Wilkins*, 27 Ch. D. 703. In this case one of the annuities was given free of duty, and a special apportionment had to be made. See also *Delves* v. *Newington*, 52 L. T. 512 (deed); *Re McMahon*, 55 Sol. J. 552.

(*f*) *Todd* v. *Bielby*, 27 Bea. 353. See *Wroughton* v. *Colquhoun*, 1 De G. & S. 357; *Carr* v. *Ingleby*, *ibid.*, 362; *Long* v. *Hughes*, *ibid.*, 364.

(*g*) *Per* Farwell, J., in *Re Metcalf*, [1903] 2 Ch., at p. 428.

(*h*) *Potts* v. *Smith*, L. R. 8 Eq. 683.

(*i*) *Re Metcalf*, [1903] 2 Ch. 424. In that case it was also held that sums paid out of capital to the immediate annuitants need not, having regard to the terms of the will, be brought into hotchpot.

Sir J. Romilly's rules.

which is insufficient, and in consequence of the deficiency the annuities have to abate, the rules as laid down by Sir John Romilly, M.R., in *Todd* v. *Bielby* (*k*) are as follows: (1) If all the annuitants are alive, the fund is divided in proportion to the actuarial or market values of the annuities (*l*). (2) If all the annuitants are dead, the fund is divided in the proportion of the arrears of the several annuities. (3) If some of the annuitants are alive and some are dead, the values of the annuities which have expired must be fixed at what the annuitants would have actually received had the fund not been deficient; the values of those which are still subsisting must be ascertained by adding the amount of the arrears actually accrued to the present value of the annuity. These rules appear to be well established (*m*).

Amount how payable.

When an annuity abates, the capital amount ascertained to be attributable to it is paid to the annuitant, or, if he is dead, to his personal representatives (*n*).

Separate funds for separate annuities.

In accordance with the general principle, that where annuities are bequeathed, the residuary legatee takes nothing until they are satisfied, it is established that if separate funds are directed to be set apart to meet separate life annuities, and to fall into residue on the death of the respective annuitants, and the estate is insufficient to provide the full amount of the annuities, then, as each annuitant dies, the fund appropriated to his annuity does not go to the residuary legatee, but is available for satisfying the other annuities in full (*o*). If, however, the testator expressly provides that the annuities shall be reduced in the event of the estate being insufficient, then the abatement is permanent, and enures to the benefit of the residuary legatee (*p*).

Priority of annuities.

As with legacies, so with annuities, no annuity has priority over other annuities, or over general legacies, unless a clear intention to that effect appears by the will (*q*). Accordingly, if a testator directs that his residue shall "in the first place" be applied in paying certain sums, "and then" in providing

(*k*) 27 Bea. 353.

(*l*) *Wroughton* v. *Colquhoun*, 1 De G. & S. 357; the principle is only adopted in the administration of an estate: *Re Nicholson's Estate*, Ir. R. 11 Eq. 177; *Re Dolling's Estate*, [1906] 1 Ir. R. 379.

(*m*) *Heath* v. *Nugent*, 29 Bea. 266; *Re Wilkins*, 27 Ch. D. 703; *Potts* v. *Smith*, L. R. 8 Eq. 683 (in the declaration as opposed to the order); *Re Metcalfe*, [1903] 2 Ch. 424, where *Potts* v. *Smith* is considered.

(*n*) See cases cited *supra*, n. (*f*).

(*o*) *Arnold* v. *Arnold*, 2 My. & K. 365; *Re Tootal's Estate*, 2 Ch. D. 628. The decision in *Scott* v. *Salmond*, 1 My. & K. 363, seems to have turned on the special wording of the will.

(*p*) *Farmer* v. *Mills*, 4 Russ. 86.

(*q*) *Miller* v. *Huddlestone*, 3 Mac. & G. 513; *Coore* v. *Toad*, 7 D. M. & G. 520 (annuities charged on land).

for annuities bequeathed by the will, "and in the next place," in payment of legacies bequeathed by the will, this does not give the annuities priority over the legacies (*r*). But a testator may show an intention to give one annuity priority over another by expressly directing the latter to be paid out of residue (*s*).

Annuity liable to forfeiture.

Sometimes annuities are given liable to forfeiture on charging or assigning. Thus, in *Re Dempster* (*t*), the testatrix gave pecuniary legacies and two annuities, and directed a portion of her estate to be appropriated to answer the annuities out of the income thereof, and declared that if the annuitants should do or suffer any act or thing whereby the annuity should be assigned, charged, or incumbered, the annuity should thereafter cease to be payable. The estate was sufficient to pay the pecuniary legacies and to purchase annuities of the amounts given by the will, but not sufficient to pay the legacies in full and to provide two funds sufficient by their income to pay the annuitants in full. Held, that sums sufficient to buy the annuities must be set aside, but that the annuitants were not entitled to payment of these sums which must be invested by the trustees in the purchase of annuities to be paid to the annuitants for their lives, or until they should assign, charge, or incumber them.

Income of a sum for life.

In *Re Richardson* (*u*), the testator gave his residue upon trust to pay the income of eight specified sums to eight persons respectively for life, each capital sum on the death of each of four of the legatees to fall into residue; the other four sums were settled. The estate was insufficient. Held, that the four legatees, the capital of whose legacies was at their death to fall into residue, ought to be treated as annuitants and that their annuities and the other four legacies ought to abate rateably, the annuities being valued as at a year from the testator's death.

Annuity in lieu of dower.

The same rules as to priority which apply to legacies given in lieu of dower apply to annuities given in that way (*x*).

Rent-charge.

It is hardly necessary to say that if a testator gives an annuity by way of rent-charge, and afterwards bequeaths legacies

(*r*) *Thwaites* v. *Foreman*, 1 Coll. 409; 10 Jur. 483. See *Ingham* v. *Daly*, 9 L. R. Ir. 494; *Re Hardy*, 17 Ch. D. 798. A power of distress and entry to enforce payment of annuities does not give them priority over legacies where all are charged on the real estate: *Roper* v. *Roper*, 3 Ch. D. 714.

(*s*) *Haynes* v. *Haynes*, 3 D. M. & G. 590; *Re Smith*, [1899] 1 Ch. 365. Compare the cases on priority of legacies, *ante*, p. 2021.

(*t*) [1915] 1 Ch. 795, following *Carr* v. *Ingleby*, 1 De G. & Sm. 362, and *Re Ross*, [1900] 1 Ch. 162 (married woman restrained from anticipation) distinguishing *Re Sinclair*, [1897] 1 Ch. 921 (where the annuity was not given by the will). See also *Re Richardson*, [1915] 1 Ir. R. 39 (annuity during widowhood); *Gratrix* v. *Chambers*, 2 Giff. 321.

(*u*) [1915] 1 Ch. 363; *Arnold* v. *Arnold*, 2 My. & K. 365, 374.

(*x*) *Norcott* v. *Gordon*, 14 Sim. 258; *Roper* v. *Roper*, 3 Ch. D. 714; *Re Greenwood*, [1892] 2 Ch. 295.

charged on the same real estate in aid of the personalty, the annuity has priority over the legacies so far as the real estate is concerned (*y*).

Arrears of annuity charged on land.

Section 10 of the Real Property Limitation Act, 1874, does not extend to an annuity charged upon real estate and secured by an express trust where the trustees remain in possession of the land (*z*).

The Administration of Estates Act, 1925.

Appropriation of Legacies and Shares of Residue.—Section 41 of the Administration of Estates Act, 1925 (*a*), gives wide powers of appropriation to the personal representatives. Certain consents are required, but the will may dispense with such consents. In the section, the expression "settled legacy, share or interest" includes any legacy, share or interest to which a person is not absolutely entitled at the date of the appropriation and also an annuity, and it authorises the setting apart of a fund to answer an annuity by means of the income of that fund or otherwise.

Trustees under a will which contains a trust for sale and conversion have power to appropriate any specific part of the estate, real or personal, towards satisfaction of a legacy or share of residue, provided that if the legacy or share is settled, the appropriated property is an authorised investment (*b*).

Right of legatee.

A person to whom a vested legacy, payable *in futuro*, is given may require the executor to set aside a sufficient sum to meet it (*c*). The legatee under a contingent bequest has no such right, but he is entitled to have security for payment (*d*).

Power to retain shares.

A power to retain shares does not preclude the absolute owner of the shares from calling for a transfer of them apart from special circumstances (*e*).

Contingent legacy of shares.

Where there is a specific legacy of shares contingent on the legatee attaining twenty-one, and some are transferred to a creditor in payment of a debt, the amount of compensation is based on the value of the shares when the legatee attains twenty-one (*f*).

(*y*) *Creed* v. *Creed*, 11 Cl. & F. 491. See also *Bell* v. *Bell*, Ir. R. 6 Eq. 239.

(*z*) *Re Jordison*, [1922] 1 Ch. 440, overruling *Re Turner*, [1917] 1 Ch. 422.

(*a*) Since the section applies whether the deceased died before or after January 1, 1926, most of the earlier cases on appropriation are omitted in this edition.

(*b*) *Re Beverly*, [1901] 1 Ch. 681 (where the earlier cases are discussed); *Re Craven*, [1916] 1 Ch. 359; *Re Wragg*, [1919] 2 Ch. 58; see also *Re Cooke's Settlement*, [1913] 2 Ch. 661. An executor cannot appropriate to himself securities having no certain value: *Re Bythway*, 104 L. T. 411. As to a refusal to appropriate, see *Re Ruddock*, 102 L. T. 89.

(*c*) Roper, 931; *Re Hall*, [1903] 2 Ch. 226.

(*d*) *King* v. *Malcott*, 9 Ha. 692; *Re Hall*, *supra*.

(*e*) *Re Marshall*, [1914] 1 Ch. 192.

(*f*) *Re Broadwood*, [1911] 1 Ch. 277.

CHAPTER LIV.

Power of executor.

If the person entitled to an immediate vested legacy cannot be found, or if the legacy is payable *in futuro* or in a contingency, the executor may appropriate a sufficient sum or invested fund to meet it, so as to be able to divide the residue (*g*). But unless power is given by the will, expressly or impliedly (*h*), to make such an appropriation, it does not bind the legatee, and therefore if the fund turns out to be insufficient, the legatee can claim against the residuary legatees (*i*). The executor is not liable if the appropriation is fairly made (*k*).

Trust for appropriation.

Where there is an express direction or trust to appropriate, the executors or trustees can of course be compelled to comply with it (*l*), but not if the trustees have a discretion which they exercise properly (*m*).

A power or trust to appropriate a fund to meet a future or contingent legacy may often be inferred from the terms of the will; as where a testator directs a sum to be invested in trust for persons in succession (*n*). "And, even if there is a contingent legacy, and by the will some of the income arising from the legacy is to go to the legatee before the contingency on which it becomes payable happens, then you may properly infer that the testator intended that a fund should be set apart and invested to answer the legacy" (*o*).

Security for payment of contingent legacy.

Where a contingent legacy is bequeathed, and the will contains no direction either express or implied for the investment of it (*p*), the legatee cannot require a sum to be appropriated to answer the legacy (*q*); and conversely the executors without the consent of the legatee have no power to make an appropriation which may be detrimental to him (*r*). But an executor before distributing the estate ought to make reasonable provision for a contingent legacy, and if he does so it seems that he would not be personally liable to the legatee if the provision so made turned out to be insufficient (*s*). Of

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(*g*) *Re Hall*, *supra*.

(*h*) *Re Oswald*, 64 Sol. J. 242. Section 41 of the Administration of Estates Act, 1925, now gives wide powers of appropriation.

(*i*) *Re Rivers*, [1920] 1 Ch. 320.

(*k*) *Ibid.*

(*l*) *Prendergast* v. *Prendergast*, 3 H. L. C. 195.

(*m*) *Re Charteris*, [1917] 2 Ch. 379.

(*n*) *Ames* v. *Parkinson*, 7 Bea. 379; *Kidman* v. *Kidman*, 40 L. J. Ch. 359.

(*o*) *Per* Romer, L.J., *Re Hall*, [1903] 2 Ch., at p. 233.

(*p*) In *Defflis* v. *Goldschmidt*, 1 Mer. 417, there was a direction to set apart a sufficient sum to meet contingent legacies, and Grant, M.R., said that the whole residue must be impounded, if necessary.

(*q*) See the statement of the rule by Turner, V.-C., in *King* v. *Malcott*, 9 Hare, 692. As to vested legacies payable *in futuro*, see *ante*, p. 2025.

(*r*) *Re Hall*, [1903] 2 Ch. 226.

(*s*) *Ib.*

course the appropriation is not binding on the legatee, unless he assents to it, and if the investment turns out insufficient he can claim against the residuary legatees.

Infant.

In the case of a legacy to an infant, the executor could not, before 1926, free the residue by setting apart securities or investments to meet the legacy (*t*); but now, by section 42 of the Administration of Estates Act, 1925, he can appoint trustees to receive the legacy.

Effect of appropriation.

If a particular fund is appropriated to the payment of a legacy, with the consent of the legatee or in accordance with the directions of the testator, and if by devastavit, or breach of trust or otherwise, the fund is diminished, the other legatees cannot be called upon to contribute to the loss (*u*). On the other hand, the fund cannot be resorted to by the executors to meet a debt due by the legatee to the testator's estate (*x*), or to indemnify themselves against liabilities incurred with reference to other parts of the estate (*y*).

So a residuary legatee, to whom an investment has been appropriated, in part satisfaction of his share, will suffer if its value falls, and benefit if its value increases (*z*). If the value of the remaining parts of the residuary estate is diminished he cannot be required to bring the appropriated investment into account (*a*).

Unappropriated legacy not entitled to share in increased value of residue.

If a testator bequeaths a legacy to his executor upon trust for A for life with remainder to his children, and the executor does not appropriate any investments to meet the legacy, but retains the residue in its original state for several years, paying A interest at 4 per cent. per annum, A and his children are not entitled to participate in any increase in the value of the residuary estate, even if the executor is one of the residuary legatees (*b*).

Administration by Court.

Where there is an administration action, the Court will allow the residuary legatee to receive the whole fund, upon giving security for the payment of the contingent legacy, or it may require a sufficient sum to be set aside (*c*).

(*t*) *Re Salaman*, [1907] 2 Ch. 46; *Re Salomons*, [1920] 1 Ch. 290; *Rimell* v. *Simpson*, 18 L. J. Ch. 55.

(*u*) *Willmott* v. *Jenkins*, 1 Bea. 401.

(*x*) *Ballard* v. *Marsden*, 14 Ch. D. 374.

(*y*) *Fraser* v. *Murdoch*, 6 A. C. 855.

(*z*) *Re Richardson*, [1896] 1 Ch. 512.

(*a*) *Re Lepine*, [1892] 1 Ch. 210.

(*b*) *Re Campbell*, [1893] 3 Ch. 468. If A had been absolutely entitled to the legacy, and had assented to its being mixed with the residue as one common fund, the case would have been different: see *Ex p. Chadwin*, 3 Sw. 380.

(*c*) *Webber* v. *Webber*, 1 S. & St. 311; *Re Hall*, [1903] 2 Ch. 226; *Defflis* v. *Goldschmidt*, 1 Mer. 417. See *Prendergast* v. *Prendergast*, 3 H. L. C. 195, *ante*, p. 2026.

CHAPTER LIV.

Annuitant.

An annuitant is entitled to have his annuity sufficiently secured (*d*). Or the Court may set apart a sufficient sum to meet it, and thus release the residuary estate (*e*). But where the will itself contains directions as to the investments which are to be appropriated to meet an annuity, it seems that they must be followed, and that the trustees cannot appropriate any other investments, even such as are authorised by the Trustee Act (*f*).

Loss of appropriated fund.

If a testator directs a fund to be invested to produce £100 a year, and that if the fund, from any cause whatever, proves insufficient to meet the annuity, the deficiency shall be made good out of the residue, this does not give the annuitant any claim on the residue if the fund is lost by the misapplication of the trustees (*g*).

Where realty is charged in aid with annuities primarily payable out of personalty, the person who would, but for the annuities, be entitled to the income of the realty, must prove that the annuities are properly secured before she can call for payment to her of the income of the realty (*h*).

Abatement of contingent legacy.

For the purposes of abatement of a contingent legacy the capital sum required must be ascertained in the case of an investment in Consols (*i*), or War Loan (*k*).

Marshalling of assets.

IX.—As to marshalling Assets in Favour of Creditors and Legatees.—Mr. Jarman continues (*l*): "It remains to consider in what cases assets are marshalled in favour of legatees or creditors.

General rule as to marshalling assets.

"On this subject it may be stated, as a general rule, that, wherever a creditor, having more than one fund, resorts to that which, as between the debtor's own representatives, is not primarily liable, the person whose fund is so taken out of its proper order, is entitled to be placed in the same situation as if the assets had been applied in a due course of administration, in other words, to occupy the position of the creditor in respect of that fund, or those funds, which ought to have been applied, to the extent to which his own has been exhausted.

(*d*) *Re Parry*, 42 Ch. D. 570, following *Webber* v. *Webber*, 1 S. & St. 311; *Re Potter*, 50 L. T. 8, and *King* v. *Malcott*, 9 Hare, 692.

(*e*) *Harbin* v. *Masterman*, [1896] 1 Ch. 351.

(*f*) *Re Owthwaite*, [1891] 3 Ch. 494.

(*g*) *Barnett* v. *Sheffield*, 1 D. M. & G. 371.

(*h*) *Re Earle*, 131 L. T. 383, applying *Harbin* v. *Masterman*, [1896] 1 Ch. 351, and distinguishing *Re Platt*, [1916] 2 Ch. 563.

(*i*) *Re Hollins*, [1918] 1 Ch. 503; *Prendergast* v. *Prendergast*, 3 H. L. C. 195.

(*k*) *Re Marsh*, 62 Sol. J. 141.

(*l*) First ed., Vol. II, p. 600.

In favour of legatees against the heir.

"Thus, if the specialty creditors of a testator who died before the 29th of August, 1833 (*m*), or the simple contract creditors of any other testator, choose to enforce payment from the personal representatives of their debtor, instead of suing (as they may do) the heir in respect of any real estate which may have descended to him, and thereby withdraw the personalty from the claim of specific or pecuniary legatees, the Courts will marshal the assets in favour of such legatees, by placing them in the room of the creditors, as it respects their claim on the descended lands (*n*); such descended assets, according to the order of application before stated, being liable before pecuniary legacies or even personalty specifically bequeathed (*o*).

But not against devisees.

"But legatees are not entitled to have the assets marshalled against the *devisees* of real estate, either specific or residuary (*p*); for to throw the debts upon the devisees, in such a case, would be to apply devised *real* estate before personal estate *not* specifically bequeathed, and thereby break in upon the established order of application before stated" (*q*).

Unless lands are charged with debts.

But if the lands devised are *charged* with debts, it is clear, upon the same principle, that the assets will be marshalled in favour of pecuniary and specific legatees; lands so charged being applicable before pecuniary or specific legacies (*r*). Thus, in *Foster* v. *Cook* (*s*) (where a testator had charged his real estate with his *debts*, and given legacies not so charged), the creditors having been paid out of the personal estate, which was not sufficient to pay both them and the legatees, the latter were allowed to come upon the real estate so far as it had been applied in payment of debts; and this decision has been

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(*m*) See Stat. 3 & 4 Wills. 4, c. 104, *ante*, p. 1940.

(*n*) *Clifton* v. *Burt*, 1 P. W. 679.

(*o*) See *ante*, p. 1975. The order has now been changed. As to descended lands, see *Re Pullen*, [1910] 1 Ch. 564. In *Re Sitwell*, 57 Sol. J. 730, where there had been a disclaimer of leaseholds and freeholds, it was held that the rules of marshalling applied as if there had been an intestacy as to the leaseholds and freeholds.

(*p*) *Mirehouse* v. *Scaife*, 2 My. & Cr. 695; *Forrester* v. *Lord Leigh*, Amb. 171; *Scott* v. *Scott*, Amb. 383; 1 Ed. 458; *Clifton* v. *Burt*, 1 P. W. 679; *Hamly* v. *Fisher*, Dick. 104, Amb. 127 (*Hanby* v. *Roberts*); *Keeling* v. *Brown*, 5 Ves. 359; *Collins* v. *Lewis*, L. R. 8 Eq. 708; *Dugdale* v. *Dugdale*, L. R. 14 Eq. 234; *Tomkins* v. *Colthurst*, 1 Ch. D. 626; *Farquharson* v. *Floyer*, 3 Ch. D. 109. The decision to the contrary in *Hensman* v. *Fryer*, L. R. 3 Ch. 420, was an error.

(*q*) *Ante*, p. 1975. The order is now changed.

(*r*) *Ante*, p. 1976.

(*s*) 3 B. C. C. 347. See also *Bradford* v. *Foley*, 3 Br. C. C. 351, n.; *Webster* v. *Alsop*, 3 Br. C. C. 352, n.; *Fenhoulet* v. *Passavant*, Dick, 253; Lord Hardwicke's judgment in *Arnold* v. *Chapman*, 1 Ves. sen., at p. 110; *Norman* v. *Morrell*, 4 Ves. 769; *Aldrich* v. *Cooper*, 8 Ves., at p. 396; from which last case it also appears that the rule as to the widow's paraphernalia is the same. *Probert* v. *Clifford*, Amb. 6, as corrected in note by Blunt, is not *contra*; and see *Snelson* v. *Corbet*, 3 Atk. 369.

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recognised in later times (*t*). The rule in this respect was not affected by Part I of the Land Transfer Act, 1897 (*u*).

Assets marshalled against devisees, etc., of mortgaged lands.

So, if the mortgagee of a devised or descended estate resort in the first instance (as he clearly may) to the personal estate of the deceased mortgagor, to the prejudice of specific or even of general pecuniary legatees (who, it will be remembered, are not liable to exonerate a devised or descended mortgaged estate (*x*)), equity will give those legatees a claim on the estate to the extent to which their funds may have been applied in its exoneration (*y*).

Effect of Locke King's Act.

Since Locke King's Act (*z*), not only specific and pecuniary legatees, but also residuary legatees and next-of-kin, are entitled to have mortgage debts and other charges on the land of the testator or intestate, as between themselves and the devisee or heir, thrown on the land in exoneration of the personal estate, unless the operation of the Act is excluded. In cases where it is excluded, however, the old rule as to marshalling applies, and therefore if a testator directs his mortgage debts to be satisfied out of his personal estate, the pecuniary legatees are entitled to have the assets marshalled under the old rule (*a*). And now the same applies to charges on personalty (*b*).

Locke King's Act has not taken away any right of marshalling.

In *Buckley* v. *Buckley* (*c*) a testator gave annuities charged on real estate and not payable out of the personalty: the real estate was subject to mortgages: as the mortgagees had two funds to resort to—the real estate and the personal estate—and the annuitants had only one—the real estate—it was held that the annuitants were entitled to marshal the assets so as to throw the mortgage debts on the personal estate in exoneration of the realty. Locke King's Act did not make any alteration in the law in questions of this kind.

(*t*) *Paterson* v. *Scott*, 1 D. M. & G. 531; *Rickard* v. *Barrett*, 3 K. & J. 289; *Surtees* v. *Parkin*, 19 Bea. 406; *Re Stokes*, 67 L. T. 223; *Re Salt*, [1895] 2 Ch. 203; *Re Roberts*, [1902] 2 Ch. 834. The decision of Kay, J., in *Re Bate*, 43 Ch. D. 600, is to be treated as overruled.

(*u*) *Re Kempster*, [1906] 1 Ch. 446.

(*x*) *Vide, ante*, p. 1987.

(*y*) *Lutkins* v. *Leigh*, Cas. t. Talb. 53; *Forrester* v. *Lord Leigh*, Amb. 171; *Wythe* v. *Henniker*, 2 My. & K. 635; *Anon*, 2 Ch. Ca. 4; *Culpepper* v. *Aston*, 2 Ch. Ca. 115; *Johnson* v. *Child*, 4 Hare, 87; *Binns* v. *Nichols*, L. R. 2 Eq. 256.

(*z*) *Ante*, p. 1987.

(*a*) *Porcher* v. *Wilson*, 14 W. R. 1011; *Re Smith*, [1899] 1 Ch. 365, not following *Smith* v. *Smith*, 10 Ir. Ch. R. pp. 89, 461, and *Burley* v. *Armstrong*, 12 Ir. Ch. R. 270.

(*b*) *Ante*, p. 1988.

(*c*) 19 L. R. Ir. 544; *Re Fry*, [1912] 2 Ch. 86. If a judgment creditor has a right to enforce payment of his debt out of property over which the testator had no power of disposition by will, the beneficiaries under the will have no equity of marshalling as against that creditor: *Douglas* v. *Cooksey* Ir. R. 2 Eq. 311.

Marshalling, where one party has several funds, and another one only.

Mr. Jarman continues (*d*): "The preceding cases, however, in which equity interferes to prevent an eventual derangement, by the act of third persons, of the order of applying the assets, do not completely exemplify an important principle by which the Courts, in marshalling assets, are governed, and which forms the peculiar feature of the doctrine; it is this,—that wherever a party has a claim upon one fund only, and another upon more than one, the party having several funds must resort, in the first instance, to that on which the other has no claim, or, in other words, the Court will so arrange the funds as to let in as large a number of claims as possible, and if the person having the several funds should, in violation of this rule, have resorted to the fund common to himself and the person having no other fund, the Court will place that person in his room, to the extent to which the common fund has been so applied (*e*).

"This principle is applied in favour of both creditors and legatees" (*f*).

This general principle does not necessarily, or even *prima facie*, apply to cases where the two classes of claims and the two sets of funds are alike created under the same instrument or sets of instruments. In such cases the relative rights of the two sets of claimants against the two sets of funds depends on the intention of the instrument (*g*).

Marshalling among legatees.

Mr. Jarman continues (*h*) "Upon the same principle, it is settled that, where there are two classes of legatees, the one having a charge upon real estate, the other having no such charge, and the personalty is not sufficient to satisfy both, the legatees whose legacies are so charged shall be paid out of the land, in order to leave the personal estate for those who have no other fund.

"Thus, in *Hanby* v. *Roberts* (*i*), where the testator, by his

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(*d*) First ed., Vol. II, p. 606.

(*e*) The general principle of marshalling is laid down by Lord Eldon in *Aldrich* v. *Cooper*, 8 Ves. 382. It is hardly necessary to say that it is not confined to the administration of assets. It will not be applied to the prejudice of third persons: *Dolphin* v. *Aylward*, L. R. 4 H. L. 486.

(*f*) As to creditors, see *Neave* v. *Alderton*, 1 Eq. Ca. Abr. 144, pl. 21; *Aldrich* v. *Cooper*, *supra*. *Haslewood* v. *Pope*, 3 P. W. 322; *Chapman* v. *Esgar*, 18 Jur. 341; *M'Carthy* v. *M'Cartie*, [1904] 1 Ir. 100. Where there was delay in payment of the simple contract creditors, they were held not entitled to stand in the place of specialty creditors to the extent of the interest which would have accrued due on the specialty debts, but only to the extent of the principal: *Cradock* v. *Piper*, 15 Sim. 301; *Wilson* v. *Fielding*, 2 Vern. 763; *Selby* v. *Selby*, 4 Russ. 336. As to the effect of a devastavit, see *Ellard* v. *Cooper*, 1 Ir. Ch. R. 376.

(*g*) *Re Townley*, [1922] 1 Ch. 154, at p. 160.

(*h*) First ed., Vol. II, p. 607.

(*i*) Amb. 127, 2 Coll. 512, *S. C.*, s. n. *Hamly* v. *Fisher*, Dick. 104. See also *Masters* v. *Masters*, 1 P. W. 421 (referring to *Hyde* v. *Hyde*, 3 Ch. R. 83); *Bligh* v. *Earl of Darnley*, 2 P. W. 619; *Norman* v. *Morrell*, 4

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will, gave several legacies (not charging them upon the real estate), and by codicil bequeathed a legacy of £3,000, *with the payment of which he charged his real estate;* the personal estate having been exhausted in the payment of the £3,000 legacy, Lord Hardwicke held that the other pecuniary legatees should stand in the place of the satisfied legatee to this extent.

Exception where legacy, as a charge upon the land, failed.

"But in *Prowse* v. *Abingdon* (*j*), Lord Hardwicke refused to marshal assets in favour of a legatee whose legacy had been originally charged upon the land, but had failed in respect of the real estate, by his death before the time of payment (*k*); his Lordship observing, that the rule as to marshalling would hold only where it was proper to be done at the time the legacy first took place, and not where it was owing to a fact which happened subsequently to the death of the testator (*l*); and this has been since followed in *Pearce* v. *Loman*" (*m*).

Demonstrative legacies.

The rule as to marshalling applies to demonstrative legacies; and accordingly, if there are two demonstrative legacies, one payable out of fund A, and the other out of funds A and B, the legatee of the latter legacy must first exhaust fund B, and if there is a deficit, he and the other legatee resort *pari passu* to fund A (*n*).

Funeral expenses.

X.—Estates of Married Women.—A few special rules applying to married women may be here referred to. A husband who pays his wife's funeral expenses is entitled to be repaid out of her separate estate (*o*).

Restraint on anticipation.

The contracts of a married woman bind only her free separate estate, and not such estate as is subject to a restraint on anticipation. But it seems that property derived from her separate estate which she is restrained from anticipating (such as the arrears of an annuity subject to restraint) is on her death liable to her debts; whether this is so or not it has been decided that she makes it liable if by her will she directs her debts to be paid (*p*).

Ves. 769; *Bonner* v. *Bonner*, 13 Ves., at p. 383; *Scales* v. *Collins*, 9 Hare, 656.

(*j*) 1 Atk. 482.

(*k*) "As to this doctrine, see *ante*, p. 1367; but see also *Pearce* v. *Loman*, 3 Ves. 135, where Lord Loughborough doubted whether in such a case, the legacy was payable even out of the personal estate. It is not easy, however, to perceive upon what sound principle the circumstance of its having been charged upon the real estate as the auxiliary fund, and having failed as to that, should vary the construction of it as a personal legacy." (Note by Mr. Jarman.)

(*l*) "But is it not always the fact of some legatee or creditor resorting to a particular fund *after the death of the testator* that occasions the requisition to marshal?" (Note by Mr. Jarman.)

(*m*) 3 Ves. 135.

(*n*) *Sellon* v. *Watts*, 9 W. R. 847.

(*o*) *Willeter* v. *Dobie*, 2 K. & J. 647; *Re M'Myn*, 33 Ch. D. 575.

(*p*) *Sprange* v. *Lee*, [1908] 1 Ch. 424.

Power of appointment.

The effect of the Married Women's Property Act, 1882, is that the execution of a general power by will by a married woman makes the property appointed liable for her debts, contracted between December 31, 1882, and December 5, 1893, provided that she had separate estate at the time they were contracted (*q*). If contracted since the latter date, it is immaterial whether she had separate estate or not (*r*). Even as regards debts contracted before 1883, property appointed by a married woman by will under a general power is liable for her ante-nuptial debts (*s*), and for debts contracted by her while under a protection order (*t*). Under the old law the better opinion seems to have been that the execution by a married woman of a general power of appointment by will only did not make the property subject to her engagements (*u*) : but she could of course charge it by her will, expressly or by implication, with her "debts" (*x*). And if property was limited to a married woman for life for her separate use, with a general power of appointment by will, it seems that it became assets for payment of her engagements, if she so exercised the power as to make the property her separate estate, or if there was a limitation in default of appointment to her heirs or (in the case of personal property) to her executors or administrators (*y*).

Order of application.

Where property becomes assets for payment of the debts of a married woman by reason of its being subject to a power of appointment which she has exercised, her separate estate must first be exhausted (*z*).

(*q*) Section 4; *Re Fieldwick*, [1909] 1 Ch. 1, overruling *Re Ann*, [1894] 1 Ch. 549. The scope of the Act is extended by the M. W. P. Act, 1893.

(*r*) M. W. P. Act, 1893.

(*s*) *Re Parkin*, [1892] 3 Ch. 510.

(*t*) *Re Hughes*, [1898] 1 Ch. 529.

(*u*) The authorities are cited in *Re Roper*, 39 Ch. D. 482. See also *Re Hodgson*, [1899] 1 Ch. 666.

(*x*) *Re De Burgh Lawson*, 41 Ch. D. 568.

(*y*) *Johnson* v. *Gallagher*, 3 D. F. & J. 494; *London Chartered Bank* v. *Lemprière*, L. R. 4 P. C. 572; *Re Harvey's Estate*, 13 Ch. D. 216; *Hodges* v. *Hodges*, 20 Ch. D. 749; Farwell on Powers, 263. See *ante*, pp. 790 *seq.*

(*z*) *Re Hodgson*, [1899] 1 Ch. 666. See *Re Isabel Williams*, 59 L. T. 310. where a married woman made a will disposing of her separate estate and exercising a general power of appointment and containing a trust for payment of her debts; she survived her husband and died in 1887 without having republished the will; during widowhood she contracted debts and became entitled to personal estate, which, under the law as it then stood, did not pass by her will; it was held that this personal estate and her separate estate were liable rateably for her debts, before the appointed property. See *Re Price*, 28 Ch. D. 709; Married Women's Property Act, 1893, s. 3; *Re Wylie*, [1895] 2 Ch. 116, *ante*, p. 59.

CHAPTER LV.

LIMITATIONS TO SURVIVORS.

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"Survivors" when construed *other*.

I.—On construing Survivor as synonymous with Other.— (1) *Survivor if unexplained is construed strictly.*—Mr. Jarman remarks (*a*): "Whether the word 'survivor' is to receive a construction accordant with its strict and proper acceptation, or is, by a liberal interpretation, to be changed into *other*, is a point which has been often discussed and variously decided. On more than one occasion expressions have fallen from eminent Judges calculated to create an impression that the term 'survivor' might by its own inherent force, and without one single ray of light from the surrounding context, be read as synonymous with *other* (*b*). [But] we are now taught by a series of decisions, which outweigh any opposing dicta or opinions, that the word 'survivor,' like every other term, when unexplained

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(*a*) First ed. Vol. II. p. 609.

(*b*) See in particular, *Barlow* v. *Salter*, 17 Ves. 479, where Sir W. Grant seems to have assumed this point. This construction has much to recommend it as carrying into effect the probable intention of testators, and as supplying a defect or inaccuracy of expression very commonly to be found in testamentary instruments. It is submitted that the decision in *Re Connellan's Trust*, 16 Ir Ch. 524, would not now be followed. It seems that "others or other" is not read as "survivors or survivor": *Re Chaston*, 18 Ch. D. 218; *Re Hagen's Trusts*, 46 L. J. Ch. 665; *Stanley* v. *Bond*, [1913] 1 Ir. R. 170. So "remaining" is not read as "surviving": *Re Speak*, 56 Sol. J. 273.

Prima facie the word "survivor" is taken in its natural meaning.

by other parts of the will, is to be interpreted according to its strict and literal meaning."

The cases of *Ferguson* v. *Dunbar* (*c*), *Milsom* v. *Awdry* (*d*), *Davidson* v. *Dallas* (*e*), *Crowder* v. *Stone* (*f*), *Ranelagh* v. *Ranelagh* (*g*), *Cromek* v. *Lumb* (*h*), *Winterton* v. *Crawfurd* (*i*), *Leeming* v. *Sherratt* (*k*), *Lee* v. *Stone* (*l*), and *De Garagnol* v. *Liardet* (*m*), all of which are stated in the fifth edition of this work, are authorities in favour of the proposition that *prima facie* the words "survivors" or "survivor" are to be construed in their literal and natural sense, and the case of *Inderwick* v. *Tatchell* (*n*) in the House of Lords is a strong authority in favour of this proposition. In that case the testator gave seven portions of his property in trust for his seven children for their respective lives, and upon their respective deceases upon trust to convey to their respective children then living as tenants in common absolutely, with a proviso that in the event of any of the testator's children dying without leaving children entitled to their, his, or her share under the will, then the shares of such children should go to "their then surviving brothers and sisters" as tenants in common for their respective lives, and after their respective decease to their respective children, and if there should be but one such surviving brother or sister, then to him or her absolutely. All the seven children survived the testator: three sons died without issue, then a fourth son died leaving children, and then a daughter died without issue: it was held that the children of the fourth son were not entitled to participate in the daughter's share. Referring to the words "then surviving," Lord Halsbury, C., said: "Reading the words as I think they ought to be read, in their natural and ordinary construction, the will is intelligible and is rational, and

(*c*) 3 B. C. C. 468, n.

(*d*) 5 Ves. 465. See also *Wollen* v. *Andrewes*, 9 J. B. Moo. 248, 2 Bing. 126.

(*e*) 14 Ves. 576. See also *Mann* v. *Thompson*, Kay. pp. 644, 645, and *Re Dunlevy's Trusts*, 9 L. R. Ir. 349.

(*f*) 3 Russ. 217.

(*g*) 2 My. & K. 441.

(*h*) 3 Y. & C. 565.

(*i*) 1 R. & My. 407.

(*k*) 2 Hare, 14. See also *Willetts* v. *Willetts*, 7 Hare, 38, and *Moate* v. *Moate*, 16 Jur. 1010.

(*l*) 1 Ex. 674. See also *Stead* v. *Platt*, 18 Bea. 50; *Parsons* v. *Coke*, 4 Drew. 296; *Greenwood* v. *Percy*, 26 Bea. 572; *Re Corbett's Trusts*, Joh. 591; *Blundell* v. *Chapman*, 33 Bea. 648; but as to the last case qu., for the strict interpretation made the substitutionary words ("or their children") inoperative. However, it was dictum only.

(*m*) 32 Bea. 608 (where the gift over was to survivors of a different class). See also *Re Usticke*, 35 Bea. 338; *Taylor* v. *Beverley*, 1 Coll. 108 (gift to one child for life, and if she die without issue, to testator's surviving children); *Re Bates*, 11 W. R. 768.

(*n*) [1903] A. C. 120. See also *Ganapathy Pillay* v. *Alamaloo*, [1929] A. C. 462.

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even if I thought the result was unjust there is no canon of construction which entitles me on that ground to alter my construction of the words as they stand. The only question, therefore, is whether there is anything in the context which enables me to read these words in a sense different from that which they ought in the ordinary use of the English language to bear" (*o*).

It may now be taken as settled that where the gift is to A, B, and C equally for their respective lives and after the death of any to his children, but if any die without children to the survivors for life with remainder to their children, only children of survivors can take under the gift over (*p*).

The mere circumstance that there occurs in the same will, in reference to another subject or other subjects, an instance of the words "survivor" and "other" being used conjunctively and as if synonymous, is not considered to imply an intention that "survivor," standing alone, shall have the same force or signification as the term with which, in other instances, the testator has associated it (*q*).

Effect where gift over is combined with a collateral event.

In *Aiton* v. *Brooks* (*r*), however, it was considered that, where the gift to the survivors was to take effect in the event of the decease of any of the prior objects of gift *combined with some collateral event*, the rule of construction adopted in the cases referred to above did not apply, but that the word "survivor" might be construed *other*, on the ground, it should seem, that, as in such cases the ulterior or substituted gift is not to take effect absolutely and simply on the decease of the prior objects, it is the less likely that the testator should intend survivorship to be an essential ingredient in the qualification of the ulterior or substituted legatees.

Word "survivor" construed *other*.

In that case, a testator bequeathed £1,500 stock to A and B during their lives in equal shares, and immediately on the death of either he directed his trustees to pay the share of such deceasing legatee to her children who should be living at their

(*o*) Other cases in favour of construing the word "survivor" according to its natural meaning are, *Harrison* v. *Harrison*, [1901] 2 Ch. 136; *Re Robson*, [1899] W. N. 260; and *Garland* v. *Smyth*, [1904] 1 Ir. 35. See also *Browne* v. *Rainsford*, Ir. R., 1 Eq. 384; *Twist* v. *Herbert*, 28 L. T. 489.

(*p*) This is known as the first rule in *Re Bowman*, 41 Ch. D. 525. If there is added a limitation over in the event of all the tenants for life dying without children, then the case falls within the second rule in *Re Bowman*, *post*, p. 2038.

(*q*) *Winterton* v. *Crawfurd*, 1 R. & My. 407. In *Slade* v. *Parr*, 7 Jur. 102, the words "survivors" and "survivor" and "others" and "other" were held to be governed by "others." But "other surviving" is synonymous with "surviving": *Beckwith* v. *Beckwith*, 46 L. J. Ch. 97. "Survivors" means "survivors or survivor": *Bowyer* v. *Douglass*, [1876] W. N. 279; *Bowyer* v. *Currall*, 2 W. R. 328.

(*r*) 7 Sim. 204.

mother's decease, and who should attain the age of twenty-one years, the interest in the meantime to be applied for maintenance; *but in case any of such children should die before they should attain the age of twenty-one years*, the testator gave the share of such deceasing child to the *survivor;* provided always, that *in case either of them the said A or B should leave any child living at their respective deceases but which should all die before they attained the age of twenty-one years*, then the trustees were to assign the share of such legatee so dying unto the *survivor* of them the said A and B, her executors or administrators. A died in the lifetime of B, leaving a child who attained twenty-one; B afterwards died without issue. Sir L. Shadwell, V.-C., held A to be entitled to B's moiety, observing, "the word 'survivor' must of necessity be taken to mean 'other,' for the testator contemplated the event, not of one of the legatees dying in the lifetime of the other, *but of one of them dying childless*."

Remark on doctrine advanced in *Aiton* v. *Brooks*.

Mr. Jarman observes (*s*): "There appears to be much good sense in the distinction here suggested by his Honor, and had it originally obtained, a large amount of litigation would probably have been prevented; but the authorities seem now to present an insuperable obstacle to its adoption, for, in almost every instance in which the strict construction of the word 'survivor' has prevailed, the gift to the survivors was to take effect in the event of the death of the predeceasing objects without issue, or combined with some other contingency. In *Ferguson* v. *Dunbar*, *Milsom* v. *Awdry*, *Davidson* v. *Dallas*, and lastly in *Crowder* v. *Stone* (which is a leading case), the gift over was to take effect on any of the objects dying, either without issue or under age, and yet it was held to apply only to the persons actually living at the period in question. Seeing, therefore, that *Aiton* v. *Brooks* was professedly grounded on a circumstance which is common to nearly all the authorities, and that some of those authorities were not cited to or present to the mind of the learned and able Judge who decided it, the case can hardly be relied on as a general authority. In fact a different rule prevailed in the subsequent case of *Leeming* v. *Sherratt*" (*t*).

Meaning of "survive."

Whether a gift, not to several persons or the survivors of them, but simply to "children who survive A," includes any not born before A's death, was decided in the affirmative in *Re Clark's Estate* (*u*), but in the negative in *Gee* v. *Liddell* (*x*).

(*s*) First ed. Vol. II. p. 617.
(*t*) 2 Hare, 14.
(*u*) 3 De J. & S. 111.
(*x*) L. R. 2 Eq. 341; and see *Trickey* v. *Trickey*, 3 My. & K. 560.

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Which meaning is correct must be determined by the context and the surrounding circumstances (*y*). In *Re Miller* (*z*) the expression "the survivor of my said son and his wife" was held to mean the survivor of any marriage.

Effect of gift over on death of *all* in a given manner.

(2) *Effect of Gift over following a Gift to Survivors.*—But where a gift to the "survivors" of several legatees, limited to take effect on a certain event (as the death of any of them under age or without issue), is followed by a gift over, not if there should be no survivor at the time the event happens, but if that event should happen to every one of the legatees (as if all die under age, or without issue), "survivors" is read "others." The cases establishing this rule were considered by Kay, J., in *Re Bowman* (*a*), and the result was stated by him to be that where the gift is to A, B, and C equally for their respective lives, and after the death of any to his children, but if any die without children to the survivors for life, with remainder to their children, with a limitation over, if all the tenants for life die without children, then the children of a deceased tenant for life participate in the share of one who dies without children after their parent (*b*); the cases which establish this rule will be found in *Re Bowman* (*a*), and it has not been thought necessary in this place to state the effect of the cases of *Doe* d. *Watts* v. *Wainewright* (*c*), *Cole* v. *Sewell* (*d*), and *Wilmot* v. *Wilmot* (*e*), which are set out in the fifth edition of this work.

Re Bowman.

In *Wilmot* v. *Wilmot* (*f*), the words of gift, in case of the death of either to the *two* surviving children, and, in case of the death of *two* to the surviving *child*, were undoubtedly favourable to this construction; and have since been held sufficient of themselves to show that by "surviving" the testator meant "other," his assumption obviously being that the others would survive (*g*). From the contingent gift over

(*y*) *Re Sing*, [1914] W. N. 90 (survivor construed "live after").

(*z*) 129 L. T. 666; see *ante*, p. 808.

(*a*) 41 Ch. D. 525.

(*b*) This is known as the second rule in *Re Bowman*.

(*c*) 5 T. R. 427 (realty settled by deed. Note that cross remainders were not *implied*: that cannot be done in a deed (*ante*, p. 635); the gift to surviving children was held to create them expressly though inaccurately).

(*d*) 4 D & War. 1, 2 H. L. C. 186 (realty settled by deed). See also *Smith* v. *Osborne*, 6 H. L. C. 375; *Re Tharp*, 1 D. J. & S. 453. It makes no difference whether the expression used is "survivors" or "such as shall survive": *Re Tharp*. As to gifts to children "then living," see *ante*, p. 1647.

(*e*) 8 Ves. 10 (personalty). See also *Lucena* v. *Lucena*, 7 Ch. D. pp. 255, 269, stated *post*, p. 2041. *Re Jackson's Trust*, 14 Ir. Ch. 472; *Re Connellan's Trust*, 16 Ir. Ch. 524; *Jackson* v. *Sparks*, 38 L. J. Ch. 75 (on the special wording of an accruer clause).

(*f*) 8 Ves. 10.

(*g*) *Re Beck's Trusts*, 37 L. J. Ch. 233; 16 W. R. 189. See an opposite inference drawn from a gift over, on the death of any one or more of *three* persons, to the survivors or *survivor*: *Northen* v. *Carnegie*, 28 L. J. Ch. 930.

of the whole in a mass it is inferred that the testator meant the legatees to take it amongst them in every other contingency, which can only be secured by means of cross limitations between them.

"Survivors" construed "others" by force of gift over.

In the common case of a gift of real or personal estate to several persons for life, with several remainders to their children, and if any of them die without children, then to the survivors for life, and afterwards to their children, it is very improbable that a testator should intend to make the interest of the children depend on the accident of whether their parent (whose interest ceases on his death) dies first or second; and if to this is added a gift over in the event of all dying without children, the conclusion is irresistible that what the testator meant was that as long as there were descendants of any to take they should take the whole: and the only mode by which effect can be given to this intention is by holding that cross remainders are created between the stocks, irrespective of the periods at which the parents die, by reading "survivors" as "others" (*h*). The authorities from Lord Thurlow's time downwards are almost uniformly in favour of reading "survivors" as "others" in such a case (*i*).

What is a sufficient gift over.

And the fact that the ultimate gift over is to the "survivor" of the class (in the literal sense of longest liver) makes no difference. To whomsoever it is given an intention is equally manifested to make a complete disposition of the property, and that all should go over in one mass (*k*). And the gift over is equally efficacious though limited to take effect only in a particular event; for in the given event the testator had a clear intention of how the whole should go over, and if the parents die, the first leaving children, and the next one or two without leaving children, there would be an intestacy (*l*).

(*h*) See *per* James, V.-C., *Badger* v. *Gregory*, L. R. 8 Eq. pp. 84, 85.

(*i*) *Harman* v. *Dickenson*, 1 B. C. C. 91, 5th edition (where the original report is corrected from R. L.); *Lowe* v. *Land*, 1 Jur. 377; *Re Keep's Will*, 32 Bea. 122; *Badger* v. *Gregory*, L. R. 8 Eq. 78; *Waite* v. *Littlewood*, L. R. 8 Ch. 70; *Re Row's Estate*, 43 L. J. Ch. 347; *Re Palmer's Settlement Trusts*, L. R. 19 Eq. 320; *Wake* v. *Varah*, 2 Ch. D. 348. See also *Davidson* v. *Kimpton*, 18 Ch. D. 213. In *Holland* v. *Allsop*, 29 Bea. 498, a gift over was by construction imported from another bequest. Note that in *Ferguson* v. *Dunbar*, 3 B. C. C. 468, n., where "survivors" was construed strictly, the events upon which the gift to issue, the gift to survivors, and the gift over, depended, were all three different; moreover, the gift to survivors was absolute and not defeasible, like the original shares, in favour of issue.

(*k*) *Wake* v. *Varah*, 2 Ch. D. at p. 357.

(*l*) *Hurry* v. *Morgan*, L. R. 3 Eq. 152. The trust was executory, with a direction to "insert clauses necessary to protect the entail"; but, although this was noticed as strengthening the case, the sufficiency of the gift over appears not to have been doubted by Wood, V.-C.: *Re Hayes's Trusts*, 9 Jur. (N.S.) 1068 (V.-C. S.), appears to be contra. See an analogous point in implying cross remainders, *Maden* v. *Taylor*, 45 L. J. Ch. at p. 573.

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Gift over inoperative on the context.

But if property is given to several as tenants in common for life, with several remainders to their children, and if any of the tenants for life die without children, to the "survivors" absolutely, or in tail, "survivors" will not be construed "others," even though there is also an ultimate gift over in case of all so dying (*m*). Here, at least, the argument that the literal construction imputes a capricious intention has no weight, for the children even of those who literally survive take nothing (as purchasers) by accruer; and the intention to keep the property together, which would otherwise be implied from the gift over, is disproved by the testator having by express intermediate limitations broken it up. Intestacy in a possible event is insufficient ground for reading the word otherwise than literally.

Residuary gift not equivalent to gift over.

And a mere residuary gift, which only prevents intestacy but shows no intention to dispose completely and in a mass of the particular property, will not supply the place of an ultimate gift over (*n*).

The so-called third rule in *Re Bowman* is not good law.

But in *Re Arnold's Trusts* (*o*), it was held by Sir R. Malins, V.-C., that the ultimate gift over was not indispensable in these cases to the construing of "survivors" as "others"; and in his opinion *Milsom* v. *Awdry* (*p*), deciding the contrary, was erroneous. In the case of *Re Bowman* (*q*), Kay, J., followed *Re Arnold's Trusts* and on the authority of that case and the cases of *Hodge* v. *Foot* (*r*), and *Re Walker's Estate* (*s*), enunciated the so-called third rule in *Re Bowman*. But in *Harrison* v. *Harrison* (*t*), Cozens-Hardy, J., after a careful review of the authorities (*u*), decided that the third rule in *Re Bowman* was not warranted by the authorities, and in *Inderwick* v.

(*m*) *Maden* v. *Taylor*, *supra*. See *Davidson* v. *Kimpton*, 18 Ch. D. 213; *Re Roper's Estate*, 41 Ch. D. 409; and *King* v. *Frost*, 15 A. C. 548; and distinguish *Cooper* v. *Macdonald*, L. R. 16 Eq. at p. 269, where real estate was devised *in tail*, and the personalty upon which the question arose was directed to go along with it; this case is shortly stated *ante*, p. 662. See also *Askew* v. *Askew*, 57 L. J. Ch. 629, where the devise was in tail.

(*n*) Semble, see *Maden* v. *Taylor*, 45 L. J. Ch. pp. 569, 575.

(*o*) L. R. 10 Eq. 252. The expression was, "*other* surviving children." But no notice was taken of this peculiarity, as to which see *ante*, p. 2036, n. (*q*). See also *Cross* v. *Maltby*, 20 Eq. 378; *Re Beck's Trusts*, 37 L. J. Ch. 233, 16 W. R. 189.

(*p*) 5 Ves. 465. See *Re Usticke*, 35 Bea. 338.

(*q*) 41 Ch. D. 525.

(*r*) 34 Bea. 349.

(*s*) 12 Ch. D. 205.

(*t*) [1901] 2 Ch. 136. See also *Garland* v. *Smyth*, [1904] 1 Ir. 35.

(*u*) *Re Benn*, 29 Ch. D. 839 (on this case see *Re Blantern*, [1891] W. N. 54); *Re Corbett's Trusts*, Joh. 591; *Wake* v. *Varah*, 2 Ch. D. 348; *Re Horner's Estate*, 19 Ch. D. 186; *Beckwith* v. *Beckwith*, 46 L. J. Ch. 97, 25 W. R. 282 (stated in the fifth edition of this work); *Milsom* v. *Awdry*, 5 Ves. 465. See also *Re Rubbins*, 78 L. T. 218; 79 L. T. 313, where Stirling, J., distinguished *Re Bowman*.

Tatchell (*x*) the Court of Appeal dissented from the third rule in *Re Bowman;* so that at the present time it may be considered as settled, with regard to the class of cases now under consideration, that in order to read the expression "survivors" as meaning "others," there must be a gift over, or some other indication of manifest intention to oust the ordinary and natural interpretation.

"Stirpital" construction.

(3) *The so-called "Stirpital" Construction.*—In *Waite* v. *Littlewood* (*y*), Lord Selborne said he thought there was a strong probability that any one using the word "survivor" did not precisely mean "other" by it, but had in his mind some idea of survivorship, though it was imperfectly expressed; and that simply to read the word as "other" was an unwarrantable alteration of a testator's language and meaning. He therefore preferred to read "survivors" or "surviving children," as meaning those who survive actually in person, or figuratively in their descendants taking an interest under the primary gift, which he appeared to consider a less violent change.

Lucena v. *Lucena.*

This construction (which was probably suggested by a figure of speech used by the Court in *Doe* v. *Wainewright* (*z*) when describing the operation in that case of cross remainders in tail) was tested in *Lucena* v. *Lucena* (*a*), where a testator gave the residue of his estate in trust for his three sons and three daughters equally, the shares of the sons to be paid at the age of twenty-five if they should conduct themselves with propriety (as they did), if not, to be settled like the shares of daughters, which were to be held in trust for them during their lives, and after their death, as to the shares of such as should die leaving issue, in trust for such issue equally, to be paid at the age of twenty-five. Then, (1), as to any daughter who should die without leaving a child who should attain twenty-five; and (2), as regards any son absolutely entitled on attaining twenty-five, if he should die before that age; or (3), if the direction to settle any son's share come into operation, if such son should die without issue (*b*), then the testator directed his or her share "to be divided equally among his (testator's) surviving children, in the same manner as his or their original shares"; and in the event of a failure of all the testator's children and their issue who were objects of the

(*x*) [1901] 2 Ch. 738. Affirmed in D. P., [1903] A. C. 120.

(*y*) L. R. 8 Ch. at p. 73. See also *Cooper* v. *Macdonald*, L. R. 16 Eq. 258, before the same judge.

(*z*) 5 T. R. 427.

(*a*) 7 Ch. D. 255.

(*b*) The events on which the gift to surviving children was to take effect, and the ultimate gift over, were obscurely expressed; they are here stated as they were construed by the Court of Appeal.

prior gifts, then over. All the sons attained twenty-five; then two of them died, one of them leaving issue; after which two of the daughters died, each leaving issue; and then the third daughter died without issue. Sir G. Jessel, M.R., held that, if all the shares had been settled, the words "surviving children" must, according to Lord Selborne's doctrine, have been construed "surviving stock," and that the fact of some only of the shares being settled did not make that construction less applicable. The effect of this was to give the third daughter's share wholly to the surviving son and the issue of the predeceased daughters, to the exclusion of both the predeceased sons. But, on appeal, it was held by the L.JJ. James, Baggallay, and Cotton, that "surviving" must be construed "other," and that the representatives of the two predeceased sons were entitled to share. The judgment of the Court was delivered by Cotton, L.J., who said: "The shares of sons who conduct themselves with propriety are indefeasibly vested at the age of twenty-five, and in our opinion it would be more reasonable to say that the idea in the testator's mind as regards sons, using the word 'surviving,' had reference to those who survived the period when their shares became indefeasibly vested (*c*), than to attribute to the word a construction which would give to the children of a son who did not conduct himself with propriety an interest under the gift to surviving children, while it gives no interest to a deceased son who had conducted himself with propriety. The fact of shares being settled, and the fact of the ultimate gift over being to arise in the event of a failure of all children and issue who are objects of the testator's bounty, are circumstances each of which may properly be relied upon as shewing that 'survivors' is not to receive its strict construction. Each of these circumstances exists in the present case. If, with the gift overstanding as it does, there had been no settlement of the daughters' shares, we are of opinion that the word 'surviving' would not have received its strict construction, and must have been construed 'other'; and our opinion is that the circumstances of the shares of some of the children named in the will being settled is not sufficient to give to the word 'surviving,' as a matter of construction, the meaning of survivors in person or in issue taking an interest under the will, though that would have been the effect of the gift to survivors if the shares of all the children and not of some only had been settled. We are of opinion that the decision of the M.R. was correct so far as he held that 'surviving' could not receive its strict construction, but that he was

(*c*) As in *Wilmot* v. *Wilmot*, 8 Ves. 10; and see *Forrester* v. *Smith*, 2 Ir. Ch. 70 ("with benefit of survivorship").

wrong in attributing to this word the meaning which he has given to it."

The stirpital construction was disapproved by the Court of Appeal in Ireland (*d*), but was adopted by Joyce, J., in the case of *Re Bilham* (*e*), in which the facts were as follows: The testatrix gave one-third of the income of a fund to her daughter M. for life, and after her death one-third of the capital of the fund to all the children of M. whom she might leave surviving who should attain twenty-one in equal shares, and she made similar gifts of the other two-thirds to her daughters C. and E. and their children. And in case of the decease of any of her said three daughters without leaving lawful issue surviving who should attain twenty-one, the testatrix gave the income of the share of the fund thereby given to her said daughters so dying to her surviving daughters in like manner as the income thereinbefore given to them for their respective lives, and after their decease she gave the capital to the children of her said surviving daughters who should attain twenty-one *per stirpes*; and there was an ultimate gift over of the fund in case of the decease of all the daughters without either of them leaving lawful issue who should attain twenty-one. C. died first, leaving her surviving two children who attained twenty-one, but died in the lifetime of E., the last surviving daughter; M. died next, leaving her surviving two children who attained twenty-one and were still living. E. died last without leaving any issue her surviving. It was held that the word "surviving" ought to be construed "surviving in stock," and that the children of M. were alone entitled to participate in E.'s share.

Re Bilham.

The stirpital construction, in the case where *all* the shares are settled, has thus finally received judicial sanction; but in the present state of the authorities it cannot yet be taken to be established.

In the subsequent case of *Re Friend's Settlement* (*f*), real estate was (by deed) settled upon trusts for the six daughters and one son of A for their respective lives as tenants in common, with remainder as to the share of each tenant for life to his or her child or children who being a son should attain the age of twenty-one, or being a daughter should attain that age or marry, and if more than one as tenants in common in fee; provided that if any one or more of the seven tenants for life should die without issue, or leaving issue and such issue being a son, should die under the age of twenty-one, or being a daughter should die

Re Friend's Settlement.

(*d*) *O'Brien* v. *O'Brien*, [1896] 2 Ir. 459.
(*e*) [1901] 2 Ch. 169.
(*f*) [1906] 1 Ch. 47.

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under that age without having been married, then the original as well as the accrued share of any such tenant for life should go and be equally divided between the survivors and survivor of these, the said seven tenants for life and their, her and his issue respectively for such estates and interests and in such shares and proportions in all respects as the original shares of the seven tenants for life were directed to be divided; and there was an ultimate limitation to the settlor in fee if all the seven tenants for life died without leaving issue who should live to attain twenty-one or marry as aforesaid. Four of the tenants for life died without issue. Another married and died leaving one child who attained twenty-one and afterwards died. Another married and died leaving several children, all of whom attained twenty-one and some of whom were still living. Farwell, J., distinguished *Re Bilham*, and held that the words "survivors and survivor" must be construed "others and other," and that all the children of tenants for life who attained twenty-one acquired absolute vested interests, irrespective of whether they did or did not survive deceased tenants for life or the tenant for life who was still living. The learned Judge relied on the words "in the same manner in all respects."

Powell v. *Hellicar.*

In *Powell* v. *Hellicar* (*g*) the testatrix gave her residuary estate upon trust for her nephew A and her two nieces B and C for their respective lives only, and after their respective deceases, then in trust for their respective children who should attain twenty-one or die under that age leaving issue, such last-mentioned child or children taking *per stirpes* and not *per capita;* and in case any or either of her said nephew or nieces should die without leaving a child or children then the share of each of them so dying "shall from time to time go to the survivors or survivor of them in like manner as is hereinbefore provided in regard to his or her or their original share or shares"; and subject to the trusts thereinbefore declared the testatrix gave her residuary estate to E, who predeceased her. A died without issue. Then B died having had three children who attained twenty-one; then C died a spinster. The three children of B petitioned for the payment out of a fund in Court representing C's original third share and the one-sixth share accrued thereto on the death of A. *Held*, that they were entitled.

"Survivors" construed *others* after an estate tail.

(4) *As to construing "Survivor" as "Other" after an Estate Tail.*—Again, it was said by Sir W. P. Wood, V.-C., in *Re Corbett's Trusts* (*h*), that where the primary devise confers an

(*g*) [1919] 1 Ch. 138. Compare *Curle's Trustees* v. *Millar*, [1920] S. C. 607; (*Lamont* v. *Millar*, [1921] W. N. 334).

(*h*) Joh. at p. 597.

estate tail, and on the death of any without issue, his share is given to the survivors or survivor, the words "survivors or survivor" are almost of necessity construed "others or other" on account of the great improbability of the testator contemplating the members of the original class as likely to be in existence at the time of an indefinite failure of issue of any of them. In *Tufnell* v. *Borrell* (*i*), where the devise was to "grandchildren their heirs male and the heirs male of the survivors and survivor for ever," it appears that in a previous stage of the case it had been decided that this gave the grandchildren joint estates for life with several estates of inheritance in tail male (*k*) *with cross remainders* in tail male: and the case now proceeding on that footing, Sir G. Jessel said it was settled that in cases of this class the term "survivors" must be read "others." It is also to be observed that the case in which (as already noted) Sir W. Grant assumed this to be the proper general meaning of the word was of the same class (*l*).

Smith v. *Osborne.*

In *Smith* v. *Osborne* (*m*), where a testator devised land to his two daughters as tenants in common in tail, and if either should die without issue then to the surviving daughter in tail, and in default of such issue over, Lord Cranworth relied on the particular language and circumstances, and on the ultimate gift over. He said: "This is not a gift to a class, and on the death of one or more to the survivors or survivor, but a gift to two designated devisees as tenants in common in tail, and if *either* should die without issue then to the surviving daughter and the heirs of her body. Unless the word 'surviving' is to be taken to mean 'other' the intention cannot be carried into effect, for he means his gift over to come into operation if either (*n*) of his daughters should die without issue, that is, on the death of the daughter who dies first, or of the daughter who dies last, and the latter object cannot be accomplished unless the word 'surviving' shall be so read as to be rendered capable of being applied to the predeceasing daughter. Add to which the gift over to the testator's right heirs is only 'in default of such issue,' that is all such issue which includes the issue of both daughters."

(*i*) L. R. 20 Eq. 194.

(*k*) As to this, see *ante*, p. 1761.

(*l*) *Barlow* v. *Salter*, 17 Ves. 479, *ante*, p. 2034, n. (*b*). See also *Williams* v. *James*, 20 W. R. 1010, presently stated, which turned on its special language.

(*m*) 6 H. L. C. pp. 375, 393. Though the rule was not noticed as such in this case, it will be observed that the reasons given for the decision were those on which the rule is founded. See also *Wollen* v. *Andrewes*, 2 Bing. 126.

(*n*) Lord Selborne thought the same argument applied, "though with rather less force," to a case where the primary gift is to a class for life with remainder to children, and the corresponding word in the gift over is "any": *Waite* v. *Littlewood*, L. R. 8 Ch. at p. 74. And in *Cole* v. *Sewell*, *ante*, p. 2038, Sir C. Sugden adverted to "the event upon which the estate was to

Williams v. *James.*

But, of course, such ultimate gift over is not the only means of showing an intention in cases of this class to use the word "surviving" in the sense of "other." Thus, in *Williams* v. *James* (*o*), where a testator devised a separate freehold property to each of five named children of his son O. in tail general: and proceeded thus, "in case if either of all the within-named children of O. shall happen to die leaving no lawful issue, or if they leave lawful issue if such issue die leaving no lawful issue, in any of such cases the property of him, her, or them so dying shall be equally transferred to the use and uses of the surviving child or children of O. *that are herein named* in tail general"; it was held by the Court of Exchequer that "surviving" meant "other" on two grounds. 1. On account of the phrase "that are herein named," by which the testator undertook to name the children who would be surviving at the future epoch; which was impossible. Some alteration was therefore necessary to make the phrase sensible. Either the words "of those" might be prefixed to it, or "other" might be substituted for "surviving." By the former alteration the testator's bounty to issue would still remain dependent on the accident of their parent surviving the child whose share was given over; by the latter this risk would be removed: and it was allowable to prefer a reasonable and probable sense to an unreasonable and improbable one. 2. On account of the general improbability observed by Sir W. P. Wood of survivorship being in such a case literally intended.

"Survivors" read "others" to effect intention that children should stand in their parents' place.

In *Eyre* v. *Marsden* (*p*), "survivor" was construed "other" in order to give effect to the intention, manifested by the will, that issue of deceased legatees should take by substitution every interest, accruing (*q*) as well as original, which their parents would have been entitled to if living at the period of distribution. The testator gave his real and personal estate to trustees, upon trust out of the rents and annual produce to pay certain life annuities to his three children, and to accumulate the surplus for the benefit of his grandchildren; and after the death of his said children and the longest liver of them, to sell and distribute the whole among his grandchildren living at his decease, in equal shares, except the share of F., the son of a deceased daughter half of whose share in the testator's estate and effects, in con-

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go over" as a ground on putting the more liberal construction on "survivors or survivor": *i.e.*, he collected the intent without resorting to the description of the donee.

(*o*) 20 W. R. 1010.

(*p*) 4 My. & C. 231, affirming 2 Kee. 564. The Court will not fill up a gap by inserting a gift in remainder and then construing "survivors or survivor" as "others or other": *Re Mears*, [1914] 1 Ch. 694, stated *post*, p. 2054.

(*q*) See s. II.

sideration of the benefit taken by F. under his uncle's will, the testator gave to his brother G.; and if any of his grandchildren should die before his her or their share or shares became payable leaving issue, such issue to be entitled to the share or shares which his her or their deceased parent *would have been entitled to if then living*; but in case of the death of any of the grandchildren without leaving issue, before he or she or they should become entitled to receive his her or their share or respective shares in manner aforesaid, then his or her share or shares were given among the testator's *surviving* grandchildren, *to be paid at the same time and in the same manner as before mentioned touching the original share or shares of his said grandchildren.* It was held by Lord Cottenham that the issue were to stand in the place of the parent as to both the original and accruing shares. He thought the description of what was given to the issue amply sufficient to carry accruing shares; but those shares were given to *surviving* grandchildren, and there would be much difficulty in the construction if it were necessary to consider the word "surviving" as meaning "living at the time of the accruer taking place." "But (he said) it is not necessary to give it that meaning. The word 'surviving' has been construed 'other' to give effect to the apparent intention. Lord Eldon so lays down the rule in *Wilmot* v. *Wilmot.* If 'surviving' were to be construed 'living at the time when the accruer takes place,' the grandchildren then living would take absolute interests, unless the words 'in the same manner,' etc., introduce into this gift the provision for the children, and the gift over upon death without children; and if it do so, why is it not also to introduce into this gift the provision for children, in the event of the parent's death before the happening of the accruer? If this construction be not adopted, upon the death of all the grandchildren but one during the life of the surviving annuitant, the share of that one, afterwards dying in the lifetime of the annuitant, would be undisposed of, although all the other grandchildren might have left children. I think the intention is sufficiently expressed, and there is ample authority for construing the words so as to give effect to such intention."

"Survivor" in gift of residue explained by another clause referring to it.

Again, in *Hawkins* v. *Hamerton* (*r*), where a testator bequeathed a leasehold estate to his son; but in case he should die without issue, to be considered as part of the residue, and to be divided amongst the children of his (testator's) three daughters as thereinafter mentioned. And he bequeathed the residue to his said son, and three daughters, or such of them as

(*r*) 16 Sim. 410; 13 Jur. 2.

should be living at his wife's death, for life, remainder to the children of his said son and daughter in equal shares; and if any of his said son and daughters should die without leaving issue, his or her share to go amongst the survivor or survivors of his said children and their issue in the like equal shares; Sir L. Shadwell, V.-C., thought that when the testator used the words "survivors or survivor," the order in which his children might die, successively, was not present to his mind; but, taking that clause in connection with the gift over of the leasehold, which showed that the testator intended the residue to be divided among the children of his three daughters, the V.-C.'s opinion was that the testator meant "others or other."

"Survivors" not read "others" if the gift thereby becomes too remote.

But a strong argument against reading the word as "other" is supplied by the fact that by so doing the will would become ineffectual; as in the case of *Turner* v. *Frampton* (*s*), where a testator bequeathed his residuary estate between his children A and B, and if either died without issue, to the *survivor*; by allowing the word its proper sense, the failure of issue was confined to failure at the death of the prior legatee, whereas by reading it as "other," such failure would have been indefinite; Sir J. Knight Bruce, V.-C., therefore refused to adopt the latter construction.

Can "survivor" mean "longest liver"?

(5) *As to construing "Survivor" as "Longest Liver."*—The word "survivor" requires a context. Survivor of whom? Survivor when? (*t*). But in some cases the words "survivors or survivor" have been held to mean "longest livers or longest liver" (*u*), in spite of the difficulty that a person cannot survive himself. Thus in *Maden* v. *Taylor* (*x*), the testator gave property in trust for four nieces as tenants in common for their lives, and after the death of any of them in trust as to her share for her children, and in case any of the nieces should die without leaving issue living at her death her share was to go to the survivors or survivor of them and her heirs; the last survivor was unmarried and beyond the age of child-bearing, and Jessel, M.R., held that she took her one-fourth absolutely. The decision was followed by Fry, J., in *Davidson* v. *Kimpton* (*y*) (where, however, the decision can be supported on the ground

Maden v. *Taylor.*

(*s*) 2 Coll. 331.

(*t*) See *per* Lord Halsbury, C., in *Inderwick* v. *Tatchell*, [1903] A. C. at p. 123.

(*u*) See *per* Lord Westbury, *Taaffe* v. *Conmee*, 10 H. L. C. at 78.

(*x*) (1876), 45 L. J. Ch. 569. See *Nevill* v. *Boddam*, 28 Bea. 554; *Haddelsey* v. *Adams*, 22 Bea. 266, and analogous cases, *Smart* v. *Clark*, 3 Russ. 365; *Tilson* v. *Jones*, 1 R. & My. 553; *Bowen* v. *Scowcroft*, 2 Y. & C. 640; *post*, p. 2087.

(*y*) 18 Ch. D. 213.

that in the first instance there was an absolute gift to the daughters), and by Chitty, J., in *Re Roper's Estate* (*z*); but the contrary construction had been adopted by Sir W. Page Wood in *Re Corbett's Trusts* (*a*), and *Maden* v. *Taylor* had been disapproved by Kay, J., in *Re Mortimer* (*b*), and by North, J., in *Askew* v. *Askew* (*c*). Subsequently, in *King* v. *Frost* (*d*), the Privy Council rejected the contention that "survivor" meant "longest liver," so that *Maden* v. *Taylor* may be considered as overruled (*e*), and the view that a person can survive himself as unsupported by the highest authorities.

General conclusion from the cases.

The result then would seem to be that the word "survivor" when unexplained by the context must be interpreted according to its literal import; but the conviction that this construction most commonly defeats the actual intention of testators has induced a readiness in the Courts to yield to the slightest indication in the context of an intention to use the word in the sense of "other." But the present state of the authorities seems hardly to justify the hope that litigation has reached its limits on this often-occurring slip, and should teach to framers of wills the necessity of increased attention to its avoidance.

II.—As to Clauses of Accruer.—(1) *Whether Accruing Shares are subject to Clauses of Accruer.*—Mr. Jarman states the rule thus (*f*):—"It has long been an established rule, that clauses disposing of the shares of devisees and legatees dying before a given period, do not, without a positive and distinct indication of intention, extend to shares accruing under the clauses in question. 'As where a man gives a sum of money to be divided amongst four persons as tenants in common, and declares, that if one (qu. any) of them die before twenty-one or marriage, it shall survive to the others. If one dies, and three are living, the share of that one so dying will survive to the other three; but if a second dies, nothing will survive to the remainder but the second's original share, for the accruing share is as a new legacy, and there is no further survivorship' (*g*).

(*z*) 41 Ch. D. 409; and also in an Irish case, *Re Hutchins*, 19 L. R. Ir. 215.
(*a*) Joh. 591.
(*b*) 33 W. R. 441.
(*c*) 36 W. R. 620.
(*d*) 15 A. C. 548.
(*e*) *Ranelagh* v. *Ranelagh*, 41 W. R. 549. See also *Nevill* v. *Boddam*, 28 Bea. 554; *Re Hill to Chapman*, 33 W. R. 570; 54 L. J. Ch. 595; *Olphert* v. *Olphert*, [1903] 1 Ir. 326 (in which, as in *Davidson* v. *Kimpton*, there was an absolute gift in the first instance).
(*f*) First ed. Vol. II, p. 621.
(*g*) *Per* Lord Hardwicke in *Pain* v. *Benson*, 3 Atk. at p. 80. See also *Perkins* v. *Micklethwaite*, 2 Ch. Rep. 171; 1 P. W. 272; *Rudge* v. *Barker*, Cas. t. Talb. 124; *Barnes* v. *Ballard*, before Lord King, cit. 3 Atk. 79; *Fitzgerald* v. *Fitzgerald*, Ir. R. 7 Eq 436.

"This doctrine, though it has been much disapproved of, is now well established (*h*); but the question sometimes arises as to the effect of particular expressions to carry the accrued as well as the original share.

Word "share" does not carry accruing share.

"The word *share* from an early period (*i*) has been held *not* to have this operation, though the contrary was decided by Lord Hardwicke in the case of *Pain* v. *Benson* (*k*); but the authority of this case has been repeatedly denied (*l*), and the point has long ceased to be the subject of controversy."

Word "*portion*" does not carry accruing share, unless aided by the context.

And the word "portion," which is evidently synonymous with "share," has also been held not to comprise an accrued share (*m*).

Mr. Jarman continues (*n*): "But although the word 'share' or 'portion' will not *proprio vigore* carry the accruing share, yet if the testator manifest an intention that the entire property, which is the subject of disposition, shall pass over to the ultimate objects of distribution in one mass, and that all the shares, original and accruing, shall be distributed among one and the same class of objects, the accruing shares will be carried over together with the original shares to those objects" (*o*).

Effect of ultimate gift over extends to intermediate accruer.

The effect of this construction of "share" is to create cross remainders or cross limitations which operate *toties quoties* upon the death of every devisee or legatee in the manner described, and carry over his whole interest, accrued as well as original (*p*).

(*h*) *Ex p. West*, 1 B. C. C. 575. See also *Crowder* v. *Stone*, 3 Russ. 217. It is remarkable that in *Perkins* v. *Micklethwaite*, *Barnes* v. *Ballard*, and *Ex p. West*, although the clause of survivorship was in terms which created a joint tenancy between the survivors in the share of the deceased legatee (see *Jones* v. *Hall*, 16 Sim. 500; *Leigh* v. *Mosley*, 14 Bea. 605), this fact was not mentioned in support of the argument for survivorship of accrued shares. The same consideration would have rendered much of the argument against the decision in *Worlidge* v. *Churchill*, 3 B. C. C. 465, unnecessary.

(*i*) *Woodward* v. *Glasbrook*, 2 Vern. 388; *Crowder* v. *Stone*, 3 Russ. 217; *Jones* v. *Hall*, 16 Sim. 500; *Goodwin* v. *Finlayson*, 25 Bea. 65; *Evans* v. *Evans*, *ib.* 81; *Maddison* v. *Chapman*, 4 K. & J. at p. 716; *Cambridge* v. *Rous*, 25 Bea. at p. 416; *Rickett* v. *Guillemard*, 12 Sim. 88.

(*k*) 3 Atk. 78.

(*l*) See *Ex p. West*, 1 B. C. C. 575; *Vandergucht* v. *Blake*, 2 Ves. jun. 534.

(*m*) *Bright* v. *Rowe*, 3 My. & K. 316; *Perkins* v. *Micklethwaite*, 1 P. W. 274.

(*n*) First ed. Vol. II, p. 622.

(*o*) *Worlidge* v. *Churchill*, 3 B. C. C. 465; *Eyre* v. *Marsden*, 2 Keen, 564; 4 My. & C. 231; *Sillick* v. *Booth*, 1 Y. & C. C. C. pp. 121, 739; *Langley* v. *Langley*, 6 L. R. Ir. 277. See also *Leeming* v. *Sherratt*, 2 Hare, 14, and *Barker* v. *Lea*, T. & R. 413, where Plumer, M.R., also reasoned upon the intention apparent in the will, that the fund should go over among the legatees in one mass, as excluding the doctrine in the text; but the point did not arise, as the deceased person (whose alleged share was the subject of dispute) had not attained the vesting age, and therefore had no share upon which the limitation over could operate. This, indeed, was admitted by his Honor in his judgment, but the terms of the decree are contrary. The case abounds in inaccuracies.

(*p*) *Doe* d. *Clift* v. *Birkhead*, 4 Ex. 110, expressly overruling *Edwards* v. *Alliston*, 4 Russ. 78; *Douglas* v. *Andrews*, 14 Bea. 347. See also *Dutton* v. *Crowdy*, 33 Bea. 272; *Re Henriques' Trusts*, [1875] W. N. 187 (settlement).

There is a difference between a gift over of the shares of any prior legatees to the survivors, and a gift to several "with benefit of survivorship." The latter expression is very general, and may without impropriety be held to pervade the whole fund, so as to carry accrued as well as original shares (*q*). It seems also that "share and interest" will carry accrued shares *proprio vigore* (*r*). And where, after a gift to sons and daughters, there was a gift over, on the death of any one or more, of *his or her* share or *shares*, it was held by Sir W. P. Wood, V.-C., that this implied a plurality of shares in one person, and therefore that it included accrued shares. If the words had been "his or their share or shares," they might have been read *reddendo singula singulis* (*s*).

"Benefit of survivorship" held to carry accrued shares.

"Interest."

"His or her share or *shares*."

In *Vandergucht* v. *Blake* (*t*), it was contended that an accrued share went over, although under the circumstances the original share could not. There a testatrix bequeathed a long Exchequer annuity to each of her three children, A, B, and C, for life, with remainders to their respective children; but if either should die without issue, then the annuity of him or her so dying to go to the survivors or survivor equally; and if all should die without issue, the three annuities were given over. A died without leaving children, and then B died *leaving children*; and it was contended that, although, as B left children, his original share could not go over, yet that his portion of the share which accrued to him on the death of A went over to C, the last survivor: but Sir R. P. Arden, M.R., decided that such portion belonged to B's administrator.

Accruing shares not necessarily subject as the original.

(2) *Whether Qualifications affecting Original Shares extend to Accruing Shares.*—"It may be observed," says Mr. Jarman (*u*), "that upon a principle very similar to that which governs the preceding cases, if original shares are given expressly for life, and accruing shares indefinitely (which of course carries the absolute interest), the latter are not considered as impliedly subject to the restriction in point of interest imposed on the original shares (*x*); for although it is highly probable that the

(*q*) See *Re Crawhall's Trusts*, 8 D. M. & G. 480; *Re Sadler*, 60 Sol. J. 89. See, however, *Vorley* v. *Richardson*, *ib.* 126.

(*r*) *Per* Romilly, M.R., *Douglas* v. *Andrews*, 14 Bea. at p. 353; and see *Re Henriques' Trusts*, [1875] W. N. 187; also *Goodman* v. *Goodman*, 1 De G. & S. 695; 12 Jur. 258.

(*s*) *Wilmot* v. *Flewitt*, 11 Jur. (N.S.) 820. *Re Chaston*, 18 Ch. D. 218. See also *Re Jarman's Trusts*, L. R. 1 Eq. 71, *post*, p. 2053.

(*t*) 2 Ves. jun. 534.

(*u*) First ed. Vol. II, p. 626.

(*x*) *Vandergucht* v. *Blake*, 2 Ves. jun. 534; *Ranelagh* v. *Ranelagh*, 4 Bea. 419; *Ware* v. *Watson*, 7 D. M. & G. 248. See also *Milsom* v. *Awdry*, 5 Ves. 465. But in *Doe* d. *Gigg* v. *Bradley*, 16 East. 399, Lord Ellenborough cut down the gift of a leasehold house to survivors indefinitely to an interest for

CHAPTER LV.

testator had the same intention in regard to the accruing and the original shares, yet this is not so clear as to amount to what the law deems a necessary implication (*y*).

"So, where a testator limits an estate to three or more objects, subject to many provisions, with a devise over the whole in case of the death of any one to the survivors, expressly *subject to the provisions contained in the original gift*, and goes on to limit the property in case of the death of any of such survivors to the remaining survivors or survivor, *but does not repeat the qualifying words*, it has been held that a similarity of intention is not to be implied in regard to the last limitation (*z*). . . .

Unequal division.

"Upon the same principle it is clear that, where the subject of gift is disposed of among the original objects in unequal shares, there is no necessary inference, in the absence of any declared intimation of intention to assimilate the accruing to the original shares, that the survivors are to take accruing shares in the same relative proportions" (*a*). Neither will words creating a tenancy in common in a gift of original shares be extended by implication to accrued shares (*b*). But in *Eyre* v. *Marsden* (*c*), it followed from the construction put on the will by Lord Langdale, M.R., that the interest of F in the accrued shares must be in proportion to his interest in the original shares.

Gift of accrued shares "in the same manner" as original.

"Shares" held to include original and accrued shares consolidated by previous provision.

Survivorship clauses are not often so split up as in *Georges* v. *Georges* (*d*): where, as more commonly happens, there is one general survivorship clause, the words "in manner aforesaid," or similar terms of reference occurring therein, will have the effect of subjecting all the accrued shares to the same terms, restrictions and limitations over as the original shares (*e*). And where a declaration, that accruing shares should be subject to the same trusts as original shares, was followed (in a settlement) by a clause which gave to each *cestui que trust* who should die without children power to appoint an aliquot part of her "share"; it was held by Sir J. Parker, V.-C., that the deed

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life, on no other ground, it would seem, than that the words of limitation were used in the original gift, not in the gift to survivors, which has not in general been considered as affording more than conjecture. The will certainly was very obscure.

(*y*) As to what is and is not such, see also *ante*, Chap. XIX.

(*z*) *Georges* v. *Georges*, Hayes's Inquiry, 52; *Gibbons* v. *Langdon*, 6 Sim. 260. Mr. Jarman's statement of *Georges* v. *Georges* is omitted.

(*a*) *Walker* v. *Main*, 1 J. & W. 1.

(*b*) *Jones* v. *Hall*, 16 Sim. 500; *Leigh* v. *Mosley*, 14 Bea. 605.

(*c*) 2 Kee, 564, *ante*, p. 2046; not appealed on this point, 4 My. & C. 231.

(*d*) Hayes's Inquiry, 52.

(*e*) *Milsom* v. *Awdry*, 5 Ves. 465; *Melsom* v. *Giles*, L. R. 5 C. P. 614; 6 C. P. 532; 6 H. L. 24; *Cursham* v. *Newland*, 2 Bea. 145 ("in the same manner").

had so consolidated the accruing and original shares in the first place as to render it unnecessary to carry on separate accounts of them; and that the word "share," in the subsequent provision, might thus be held to include the whole fund which, under the previous trusts, belonged to either of the beneficiaries and her children (*f*). And in *Re Jarman's Trusts* (*g*), where, after a life estate in the whole to his wife, a testator bequeathed a sum of money to his three daughters in equal shares, and gave the residue amongst them in certain proportions, adding, "the share or shares of my said daughters under my will to be for their sole and separate use"; and if any of them died without issue before the wife, her or their share or shares, accruing as well as original, were given to the survivors or survivor; it was held by Sir W. P. Wood, V.-C., that the words of the separate use clause were large enough to affect the accrued as well as the original shares. Though not distinctly assigned by the Court as the reason for this decision, there would seem, in fact, to have been a sufficient consolidation of shares within Sir J. Parker's principle. That the consolidating clause followed, instead of preceding, the clause in dispute was of course immaterial (*h*).

Re Jarman's Trusts.

Again, if there be a gift to several (but not all) of a class (as children) with a gift over in case of the death of any to "the surviving children" all the children will be included in the latter gift and not those only who partake of the original gift; although those who do not so partake are otherwise provided for (*i*).

Survivorship amongst a more extensive class than the original donees.

In *Re Ridge's Trusts* (*k*), the testator gave his residuary personal estate upon trust to pay the income equally between his three daughters F, E, and C during their respective lives, and, if all or any of them should die leaving issue, to pay one-third of the principal amongst the issue of each daughter so dying in equal shares: and if only one such daughter should die leaving issue, then in trust to pay and apply the whole residue equally amongst the issue of such one daughter; but if all the daughters should die without leaving issue then over. C died leaving issue: afterwards F died without leaving issue. It was held that cross-limitations were to be implied between the daughters and their families, and that the issue of each daughter were for all purposes to be ascertained at her own death; and that therefore one moiety of F's share was payable to the issue

Re Ridge's Trusts.

(*f*) *Re Hutchinson's Settlement*, 5 De G. & S. 681. See *Moore* v. *Godfrey*, 2 Vern. 620.

(*g*) L. R. 1 Eq. 71.

(*h*) So in *Hayes* v. *Hayes*, [1917] 1 Ir. 194, it was held that accrued portions were only raiseable on marriage like the original portions.

(*i*) *Carver* v. *Burgess*, 18 Bea. 541.

(*k*) L. R. 7 Ch. 665. See also *Heasman* v. *Pearse*, *ib.* at p. 285, where the words "then living" were got over on much the same principle.

of C living at C's death, and the other moiety went by way of accretion to E's original share. James, L.J., said that if the will had run "I give the gift to the three and on their death to their respective children, and if any of them should die without children then to the survivor or survivors, and if all should die without children, then over," that would have been a case in which "survivors" would have been construed "others." In *Re Mears* (*l*), the testator bequeathed personal estate to his three daughters equally for life, and, after the decease of any of them leaving issue, to pay a third part of the capital to her children, and, in the event of any of his daughters dying without leaving issue, the survivors or survivor were to take her share of the income for life, and in case all his daughters should die without leaving issue the capital was to be divided among his statutory next-of-kin. Two daughters died, one leaving children. The third subsequently died without leaving issue. Eve, J., held that he was not entitled to fill up the gap by inserting the gift in remainder and then to construe the words "survivors or survivor" as meaning "others or other," and that in the event which had happened there was an intestacy as to two-thirds of the capital.

Re Mears.

Effect where qualification is necessary to validity of gift of accruing shares.

"Here it is proper to observe," remarks Mr. Jarman (*m*), "that though a departure from the ordinary rules of construction, for the purpose of bringing a devise or bequest within due limits, is not an acknowledged principle of construction, indeed is always professedly discarded; yet it is impossible to deny that, where the bequest of the accruing shares would be void for remoteness, unless the qualifications applied in terms to the original shares are extended to such accruing shares, the Courts have lent a more willing ear to such construction than the preceding cases prepare us to expect. An example of this occurs in the case of *Trickey* v. *Trickey* (*n*), where a testator bequeathed the residue of his personal estate to trustees in trust for his daughter, and after her decease for all and every the child or children of his daughter, share and share alike, when they should respectively attain twenty-one, with maintenance in the meantime; and in case any of the said children should die under twenty-one and leave one or more child or children *who should survive the testator's daughter* and live to attain twenty-one, such child or children to be entitled to his or their parent's share: provided also, that in case any child or children of his daughter should die before attaining twenty-one the share or shares of such child or children should go to the survivor or survivors,

Gifts of accrued shares supported by engrafting thereon a qualification expressly applied to original shares.

(*l*) [1914] 1 Ch. 694.
(*m*) First ed. Vol. II. p. 629.
(*n*) 3 My. & K. 560.

and the issue of any deceased child or children who should marry and die under twenty-one, to be equally divided between them if more than one; the issue of any deceased child or children to stand in the place of the parent or parents, with a limitation over, *provided there should be no child of his daughter, or, there being any such, no one of them should live to attain twenty-one nor leave any issue who should live to attain that age.*"

By a codicil the testator willed that, on failure of children and grandchildren of his daughter, as in his will was expressed, his bank stock, etc., should be transferred to certain relations. It was contended that the testator's intention was that all such grandchildren of his daughter as should attain twenty-one should take a vested interest, and that the limitation over, which was to take effect only upon failure of such grandchildren was too remote; but Sir J. Leach, M.R., observed that it was "reasonable to intend that the testator meant that the same grandchildren, who, by the former clause, were to take their parent's original share should take that portion of the share which accrued by the death of another child of the daughter without leaving issue, and which their deceased parent, if living, would have taken, namely, the grandchildren only *who should survive the daughter.* If the prior gifts were only in favour of grandchildren who should survive the daughter, the gift over must be intended to take effect upon the failure of the former gifts."

To what period survivorship referable.

III.—Words of Survivorship, to what Period referable.—(1) *Where the Gift is immediate.*—Mr. Jarman continues (*o*): "Another question which arises under gifts to survivors is, whether they mean survivors indefinitely or survivors at some specific point of time. Where the objects are tenants in common, it was for a long period considered that indefinite survivorship being inconsistent with a tenancy in common, some period was to be found to which the words of survivorship could be referred. This reasoning, however, is obviously inconclusive; for although survivorship is not incident to a tenancy in common, yet there is no inconsistency between a tenancy in common and an *express* limitation to survivors (*p*). The testator's intention that the property shall devolve to the survivors is better effected by an express gift to them than by a joint tenancy, the survivorship which is incidental to the latter being liable to be defeated by a severance of the tenancy.

(*o*) First ed. Vol. II. p. 631.

(*p*) See judgment in *Doe* d. *Borwell* v. *Abey*, 1 M. & Sel. 428; *Taaffe* v. *Conmee*, 10 H. L. C. at p. 78. Sometimes a gift to survivors, accompanying a joint tenancy, is considered as merely expressive of the *jus accrescendi* which is incident to such a devise. See *Doe* v. *Sotheron*, 2 B. & Ad. 628.

CHAPTER LV.

When the gift is *immediate.*

"In seeking for a period to which the words of survivorship could be referred, the obvious rule where the gift took effect in possession, immediately on the testator's decease, was to treat these words as intended to provide against the death of the objects in the lifetime of the testator, the devise affording no other point of time to which they could be referred; accordingly we find this to be the established construction.

Survivorship referred to *death of testator.*

"Thus, in the case of *Lord Bindon* v. *Earl of Suffolk* (*q*), where a testator bequeathed £20,000 (due to him from the Crown) to his five grandchildren, share and share alike, equally to be divided between them, *and if any of them died, his share to go to the survivors and survivor of them*; Lord Cowper said, that by the first words it was very plain that the legatees were tenants in common, and by the subsequent words it must be intended, if any of them should die *in the lifetime of the testator.* This decree, however, was reversed in the House of Lords, on the ground that the words in question referred not to the death of the testator, but to the time of receiving the money, which was a debt due from the Crown of rather a desperate nature; but the principle of Lord Cowper's decision has since been repeatedly recognised (*r*).

"The more recent case of *Smith* v. *Horlock* (*s*) presents an instance of a similar construction in reference to real estate. A testator gave all his real and personal property to be equally divided between his two children, *and to the longest liver*, in fee simple; (there were some intervening words, which are immaterial to the point in question); and it was held, that one child who alone survived the testator took the whole."

Notwithstanding prior gifts of annuities.

And the charging of a general fund with the payment of certain life annuities, subject to which the fund is bequeathed to the "surviving" children of A, would probably be held not to vary the construction: *i.e.* the fund would vest in possession in such children as survived the testator, subject only to the particular charges (*t*).

(*q*) 1 P. W. 96. But see *Hawes* v. *Hawes*, 1 Wils. 165; 3 Atk. 523, where the testator devised an estate to his four younger children in fee as tenants in common, and not as joint tenants, *with benefit of survivorship*; and Lord Hardwicke held, that inasmuch as personal estate was bequeathed to them, with a limitation to the survivor, if any of them died *under age and unmarried*, the devise of the real estate was to receive the same construction. See also *Forrester* v. *Smith*, 2 Ir. Ch. 70.

(*r*) See *Roebuck* v. *Dean*, 2 Ves. jun. at p. 267; *Russell* v. *Long*, 4 Ves. 551; *Bass* v. *Russell*, Taml. 18; *Clarke* v. *Lubbock*, 1 Y. & C. C. C. 492; *Ashford* v. *Haines*, 21 L. J. Ch. 496.

(*s*) 7 Taunt. 129; but see *Barker* v. *Giles*, 2 P. W. 280, *post*, p. 2077; *Blisset* v. *Cranwell*, 1 Salk. 226; *Doe* d. *Borwell* v. *Abey*, 1 M. & Sel. 428, *post*, p. 2076.

(*t*) See *Lill* v. *Lill*, 23 Bea. 446, and an analogous point, *ante*, p. 1646.

Where gift *not immediate.*

(2) *Where Gift is not immediate; Rule in* Cripps *v.* Wolcott. —"Where, however," says Mr. Jarman (*u*), "the gift was not immediate (*i.e.* in possession), there being a prior life or other particular interest carved out, so that there *was* another period to which the words in question could be referred, the point was one of greater difficulty. In *these* cases, indeed, as well as in those of the other class, the Courts for a long period uniformly applied the words of survivorship to the death of the testator, on the notion (as already observed) that there was no other mode of reconciling them with the words of severance creating a tenancy in common. The weight ascribed to this argument, however, was still more extraordinary in these than in the former cases; for, even if *indefinite* survivorship were inconsistent with a tenancy in common (but which it clearly was not), yet surely there could be no incongruity between such an interest and a limitation to the survivors *at a given period*; nevertheless, decision rapidly followed decision, in which, on reasoning of this kind, survivorship was held, in cases of this sort, to refer to the period of the testator's decease."

Remarks upon the cases prior to *Cripps* v. *Wolcott.*

In the earlier editions of this work, after a statement of the cases of *Stringer* v. *Phillips* (*x*), *Rose* d. *Vere* v. *Hill* (*y*), *Wilson* v. *Bayly* (*z*), *Roebuck* v. *Dean* (*a*), *Perry* v. *Woods* (*b*), *Maberly* v. *Strode* (*c*), *Brown* v. *Bigg* (*d*), *Garland* v. *Thomas* (*e*), *Edwards* v. *Symons* (*f*), and *Doe* d. *Long* v. *Prigg* (*g*) (in all of which survivorship was referred to the death of the testator or testatrix), Mr. Jarman continues as follows (*h*):—"This case (*i*) closes the long series of authorities in favour of the construction in question, which might seem to have established, if reiterated adjudication could settle any point, that a gift to several objects as tenants in common, and the survivors and survivor of them, vested the subject of gift absolutely in the objects living at the death of the testator, the words of survivor-

(*u*) First ed. Vol. II. p. 633.
(*x*) 1 Eq. Ca. Ab. 293; but see 1 Cox's P. W. 97, n. In Eq. Ca. Ab. the legacy is inaccurately stated as given to the five legatees. Note, however, that they all survived the testator's sisters.
(*y*) 3 Burr. 1881.
(*z*) 3 B. P. C. Toml. 195, reversing decree in the Irish Chancery; see the will more fully stated, *ante*, p. 589.
(*a*) 2 Ves. jun. 265. As to this case, see Sir W. Grant's judgment in *Hallifax* v. *Wilson*, 16 Ves. at p. 171; and Sir J. Leach's in *Cripps* v. *Wolcott*, 4 Mad. at p. 15, *post*, p. 2063.
(*b*) 3 Ves. 204.
(*c*) 3 Ves. 450. But see *Gibbs* v. *Tait*, 8 Sim. 132.
(*d*) 7 Ves. 279.
(*e*) 1 B. & P. N. R. 82.
(*f*) 6 Taunt. 213.
(*g*) 8 B. & Cr. 231.
(*h*) First ed. Vol. II. p. 640.
(*i*) *Doe* v. *Prigg*, 8 B. & Cr. 231.

ship being referable to that period. The sequel will serve to show that no rule of construction, however sanctioned by repeated adoption, is secure of permanence, unless founded in principle; for to the inadequacy of the grounds upon which the rule was established may, it is conceived, be ascribed, not only the frequent agitation of the question evinced by the multitude of cases just stated, but the sweeping and, as we shall see sometimes, groundless exceptions ingrafted upon it, which at length rendered it doubtful whether such a rule of construction any longer existed, or rather occasioned its total subversion, in reference at least to personal estate. For the reader, on a perusal of the cases which remain to be stated, will probably find himself impelled to the conclusion, that where there is a gift of personal estate to a person for life or any other limited interest, and after the determination of such interest to certain persons *nominatim*, or to a class of persons as tenants in common, *and the survivors of them*, these words are construed as intended to carry the subject of gift *to the objects who are living at the period of distribution*. This result, however, was not attained until after many gradations. In the first instance survivorship was held to relate to the period of distribution and not to the death of the testator, on the ground that the subject of gift (being the produce of lands devised to be sold) was not *in esse* until this period.

Survivorship referred to *period of distribution.*

"Thus, in the case of *Brograve* v. *Winder* (*k*), where a testator devised his real estates to A for life, with remainder to his first and other sons in tail male, and in default of sons of A, gave his estates to trustees to sell, and willed that the money arising by such sale or sales should be equally distributed among the three sons and daughter of W., *or the survivors or survivor of them*, and that such fourth or other part as the daughter should become entitled to should be settled in a certain manner; Lord Loughborough admitted that in general it was perfectly true that these words would not prevent the vesting at the death of the testator, but the circumstances of this will, he said, gave it a very different effect. 'In this will (observed his Lordship), the penning of which is very particular, when once you fix the intention that they shall take it as money, which is clearly the sense of this will, there is no gift till the distribution; the object of the distribution is pointed out to be among the persons named, "or the survivors or survivor"; that excludes the possibility of taking in, as objects of the distribution, persons who are dead.'

Subject of gift being the produce of a future sale.

"So, in *Newton* v. *Ayscough* (*l*), where a testator gave to

(*k*) 2 Ves. jun. 634.
(*l*) 19 Ves. 534.

Survivorship referred to the period of distribution.

A £400 four per cent. Consolidated Annuities for her to receive the interest during her life, and after her decease the £400 to be sold and divided among his residuary legatees, *or the survivor of them, share and share alike*; and he appointed B, C, and D, residuary legatees of his will, share and share alike. On a question whether one of the legatees dying in the lifetime of A was entitled, Sir W. Grant said, 'To what period survivorship is to relate, depends not upon any technical words, but upon the apparent intention of the testator, collected either from the particular disposition or the general context of the will.'—'Here is a direction to trustees at the death of the tenant for life to sell the fund, and divide the produce among his residuary legatees, "or the survivor of them, share and share alike." That naturally points to the period of sale as the period to ascertain who are the persons to take, and brings this case much nearer *Brograve* v. *Winder* (*m*) than *Perry* v. *Woods* (*n*). In *Brograve* v. *Winder*, Lord Loughborough's opinion was that the survivor at the time of the sale, not at the death of the testator, was intended. In *Perry* v. *Woods*, the testator had by his will furnished evidence of his own intention with regard to the meaning of the word "survivor."'—'The case of *Russell* v. *Long* (*o*), decided by Lord Alvanley soon afterwards, shows that he did not conceive there was any rule requiring survivorship to be generally referable to the death of the testator, but thought it might refer either to that period or the death of the tenant for life, according to the apparent intention of the testator.'

Sir W. Grant's judgment in *Newton* v. *Ayscough*.

[There is an inconsistency between the expressions of Lord Alvanley in *Russell* v. *Long*, and his decisions in *Perry* v. *Woods* (*n*) and *Maberly* v. *Strode* (*p*).] "The latter shows that he *did* consider survivorship in these cases to be generally referable to the death of the testator, as the only mode of reconciling it with the tenancy in common; and even Sir W. Grant himself in *Shergold* v. *Boone* (*q*) stated this to be the result of the authorities; which opinion accords with his Honour's decision in *Brown* v. *Bigg*.

"It is a circumstance worthy of remark, that, down to this period, in all the cases where survivorship had been referred to the time of division, the expression was '*or* the survivor,' although no attempt was made to found a distinction on this particular phraseology.

(*m*) *Ante*, p. 2058.
(*n*) 3 Ves. 204.
(*o*) 4 Ves. 551.
(*p*) 3 Ves. 450.
(*q*) 13 Ves. at p. 375.

CHAPTER LV.

Survivorship referred to the period of distribution on special grounds.

"Another instance, in which the case of *Brograve* v. *Winder* has been followed, is *Hoghton* v. *Whitgreave* (*r*), where a testator gave his real and the residue of his personal estate to his wife for life, and after her decease to trustees, upon trust to sell the real estate; and directed that the money arising from the sale, as also the rents from the death of his wife until the sale, as well as the residue of his personal estate, should be paid and equally divided among his nephews and nieces after mentioned, *and the survivors or survivor of them, viz.* A. M. etc.; and he thereby bequeathed the same to them, *and to the survivors or survivor of them*, after the decease of his wife, and in manner aforesaid. The question was, whether the nephews and nieces surviving the widow were entitled, to the exclusion of those who died in her lifetime. Sir T. Plumer, V.-C., held that the former *were* entitled, considering the case as not distinguishable from *Brograve* v. *Winder* (*s*). 'The subject-matter, (said his Honour), is not to be converted into money till after the death of the tenant for life; it is then that for the first time anything is given to the trustees: it is given upon trust to be converted into money, and then to be divided. Thus, not only was there no bequest till the widow's death, but the subject-matter did not until then exist in the shape and form in which it is given. It is given to those persons and the survivors or survivor of them, and seems to fall under the general rule, that legacies given to a class of persons vest in those who are capable of taking at the time of distribution (*t*). Here he mentions them *nominatim*, but he then takes off the effect of that by adding the words, "and to the survivors or survivor." He cannot mean such as survive him, for the governing clause, that containing the gift, refers to the death of his wife as the period when it is to operate.' And he afterwards adverted to the subsequent gift, 'in manner aforesaid,' as precluding the argument that it was to go to those who survived him after the death of his wife.

As to there being another bequest *expressly* to survivors *at distribution.*

"Another ground upon which a gift to survivors has been held to refer to survivors at the period of distribution, and not at the death of the testator, is that some other subject-matter given to the same objects is *expressly* limited in that manner.

"Thus, in *Daniell* v. *Daniell* (*u*), where the testator bequeathed certain stock in trust for his wife for life, and after her decease to his children, but in case his wife should have no child of his at her decease living, then, as to £1,000, part thereof,

(*r*) 1 J. & W. 146.
(*s*) *Ante*, p. 2058.
(*t*) This is a mistake.
(*u*) 6 Ves. 297.

to pay the interest to his sister J. D. during her life, and at her decease the £1,000 to be paid equally between *her said two sons J. and F., or the whole to the survivor of them.* In the preceding part of the will another sum of £1,000 was given to trustees, in trust, after the decease of his wife without issue by him, to pay his said sister the interest for life, and after her decease the principal to be paid to the said J. and F., share and share alike, in *case they should be living at their mother's death*; but in case either of them should die before her, then the whole to be paid to the survivor. F. died in the lifetime of the testator's widow; at her death, the testator's sister J. D. being also dead, a bill was filed by J. for the first-mentioned £1,000 as the survivor at the death of the last surviving tenant for life, which was resisted by the representatives of F., claiming as one of the survivors at the death of the testator. Sir W. Grant said, 'It is clear the testator meant the survivor at the time of the division. He did not conceive that would take place till both his wife and Mrs. D. (*i.e.* J. D.) were dead; he conceived the deaths would happen in the order of the limitation. *The mode in which he disposed of the other two sums confirms, instead of opposing, this construction,* showing that the period of division was the period at which he intended it to vest. *He had the same meaning as to this fund:* he who is alive when the division takes place takes the whole of the capital.'

Remarks upon *Daniell* v. *Daniell.*

"The reasoning of this case agrees with that of Lord Hardwicke in *Hawes* v. *Hawes* (*x*), and it would seem with Lord Alvanley's in *Perry* v. *Woods* (*y*); but stands singularly contrasted with Sir W. Grant's own observations upon the latter case in *Newton* v. *Ayscough* already noticed, where he considered that survivorship being expressly made referable to the death of the tenant for life in another bequest, raised an argument in favour of a *different* construction in the bequest in question, where such expressions were omitted (*z*). The only circumstance of distinction is, that in *Perry* v. *Woods* the other bequest was to different objects.

Survivorship referred to period of distribution, there being another gift *expressly* to survivors at that period.

"The doctrine of the case of *Daniell* v. *Daniell* was referred to with approbation, and adopted in the recent case of *Wordsworth* v. *Wood* (*a*), where a testator gave certain real and personal property to his wife for life, and after her decease to his *then* surviving children, share and share alike, independently

(*x*) *Ante*, p. 2056, n. (*q*).

(*y*) 3 Ves. 204. See also *Sheppard* v. *Lessingham*, Amb. 122, *ante*, p. 557.

(*z*) See also *Campbell* v. *Campbell*, 4 B. C. C. 15.

(*a*) 2 Bea. 25; 4 My. & Cr. 641; affirmed in D. P. on the same grounds, 1 H. L. C. 129.

of the rental of his said estates, which he gave to *his surviving female children*. Lord Langdale, M.R., held, that a daughter who died in the lifetime of the widow was excluded from the rents, and one of the grounds of this construction he considered to be, that such a daughter was not an object of the immediately preceding devise of the estates, the testator's apparent intention being by the second gift merely to exclude the sons, and not to introduce a new class of daughters. His Lordship, in the course of his judgment, said, 'The rule is, that where an interest is given to a person for life, and after his death to his surviving children, those only can take who are alive when the distribution takes place.' Upon appeal, Lord Cottenham also considered that, independently of the general rule, there was sufficient ground for holding the deceased daughters to be excluded, according to *Brograve* v. *Winder*, *Newton* v. *Ayscough*, *Hoghton* v. *Whitgreave*, and *Daniell* v. *Daniell*; his Lordship more particularly expressing his concurrence in the line of argument pursued by Sir W. Grant in the last-mentioned case.

Remarks upon *Brograve* v. *Winder*, *Newton* v. *Ayscough*, *Hoghton* v. *Whitgreave*, and *Daniell* v *Daniell*.

"The general rule referring survivorship to the death of the testator was, it will be observed, departed from in the preceding cases only upon particular grounds; and these cases, by resting the construction on the special circumstances, might seem indirectly to afford a confirmation of that rule. Their effect, however, in consequence of the indefinite and questionable nature of the exceptions which they went to establish, evidently was to strike at the root of the rule itself, and to prepare the way for its abandonment in cases where such circumstances did not exist.

History of the present doctrine.

"It is curious to observe, in the history of this rule of construction, the steps by which an established doctrine is overturned. Lord Loughborough, we have seen, first departed from it, founding that departure upon a circumstance which furnished no real distinction, but at the same time with an anxious recognition of its authority (*b*). Sir W. Grant in *Daniell* v. *Daniell* (*c*), probably disapproving of the reasoning which led to the adoption of the rule, as well as of the distinction which had been engrafted on it, applied the principle of the exception to a case not warranted by the terms of the former decision; and although he did not treat the established rule with the same professions of reverence and submission as Lord Loughborough, yet, by placing his own case upon special grounds, impliedly bowed to its authority. In *Newton* v. *Ayscough* (*d*), however, the same learned Judge went a step further, and, while he applied Lord

(*b*) See *Brograve* v. *Winder*, 2 Ves. jun. 634.
(*c*) 6 Ves. 297.
(*d*) 19 Ves. 534.

Loughborough's construction in *Brograve* v. *Winder* to an exactly similar case, boldly denied the existence of any contrary rule of interpretation. Its overthrow, we shall find, was completed in a subsequent case, remaining to be stated, in which another learned Judge not only disavowed the rule, the foundation of which had been thus gradually sapped, but confidently laid down an opposite doctrine.

Survivorship referred to the time of distribution. *Cripps* v. *Wolcott.*

"The case here referred to is *Cripps* v. *Wolcott* (*e*), where the testatrix gave and appointed her real and personal estate, in trust for her husband for life, and after his decease directed that her personal estate should be equally divided between her two sons A and B, and C her daughter, *and the survivors or survivor of them, share and share alike.* A died in the lifetime of the husband; B and C, as the survivors at his death, claimed the whole. Sir J. Leach said, 'It would be difficult to reconcile every case upon this subject. I consider it, however, to be now settled, that if a legacy be given to two or more, equally to be divided between them, or to the survivors or survivor of them, and there be no special intent to be found in the will, *the survivorship is to be referred to the period of division.* If there is no previous interest given in the legacy, then the period of division is the death of the testator, and the survivors at his death will take the whole legacy. This was the case of *Stringer* v. *Phillips* (*f*). *But if a previous life estate be given, then the period of division is the death of the tenant for life, and the survivors at such death will take the whole of the legacy.* This is the principle of the cited cases of *Russell* v. *Long* (*g*), *Daniell* v. *Daniell* (*h*), and *Jenour* v. *Jenour* (*i*). In *Bindon* v. *Lord Suffolk* (*k*), the House of Lords found a special intent in the will, that the period of division should be suspended until the debts were recovered from the Crown, and they referred the survivorship to that period. The two cases of *Roebuck* v. *Dean* and *Perry* v. *Woods*, before Lord Rosslyn (*l*), do not square with the other authorities. *Here there being no special intent to be found in the will, the terms of survivorship are to be referred to the death of the husband who took a previous estate for life.*'

General rule as stated by Sir J. Leach.

Remarks on *Cripps* v. *Wolcott.*

"Although this seems to have been at the time a very bold decision, involving as it did direct opposition to no less than nine

(*e*) 4 Mad. 11. See also *Browne* v. *Lord Kenyon*, 3 Mad. 410.
(*f*) This is not correct; see *ante*, p. 2057.
(*g*) 4 Ves. 551.
(*h*) 6 Ves. 297.
(*i*) 10 Ves. 562.
(*k*) 1 P. W. 96.
(*l*) *Perry* v. *Woods* was decided by Lord Alvanley.

cases (one decided by the House of Lords (*m*)), and although it is to be regretted, that the actual state of the authorities was not brought to the attention of the learned Judge, yet the rule of construction which he propounded, seems to be so reasonable and convenient for general application, that it is not surprising that subsequent Judges have been favourably disposed to its adoption," as will appear by the cases of *Blewitt* v. *Roberts* (*n*), *Neathway* v. *Reed* (*o*), which are stated in the last edition, and the other cases referred to in the footnotes (*p*).

So where the income of personal property is bequeathed to several persons for life, and after the death of all to their surviving children, those children alone take who are living at the death of the last surviving tenant for life (*q*). And where the gift is to A for life, and at his death to B for life, and at his death to the surviving children of C, only those children are entitled who are living at the actual period of distribution, whether A or B dies last (*r*).

(*m*) *Wilson* v. *Bayly*, 3 B. P. C. Toml. 195.

(*n*) 10 Sim. 491; 4 Jur. 501; 9 L. J. Ch. 209; affirmed by Lord Cottenham, Cr. & Ph. 274; but as he held the children entitled for life only (as to which see *Bent* v. *Cullen*, L. R. 6 Ch. 235), was not the survivorship indefinite? See *post*, p. 2068. See also *Gibbs* v. *Tait*, 8 Sim. 132, which, however, was based on *Brograve* v. *Winder*, and that class of cases; *Wordsworth* v. *Wood*, *ante*, p. 2061.

(*o*) 3 D. M. & G. 18. See also *Williams* v. *Tartt*, 2 Coll. 85; *Eaton* v. *Barker*, *ib.* 124; *Buckle* v. *Fawcett*, 4 Hare, 536; *Hesketh* v. *Magennis*, 27 Bea. 395; *Young* v. *Davies*, 2 Dr. & Sm. 167; *Thompson* v. *Thompson*, 29 Bea. 654; *Whitton* v. *Field*, 9 Bea. 368; *Taylor* v. *Beverley*, 1 Coll. 108; *Re Pritchard's Trusts*, 3 Drew. 163. The three last cases were aided by context. See also *Shaw* v. *Shaw*, 25 L. R. Ir. 30.

(*p*) *Pope* v. *Whitcombe*, 3 Russ. 124; *Re Crawhall's Trust*, 8 D. M. & G. 480; *Young* v. *Davies*, 2 Dr. & Sm. pp. 167, 170; and more fully, 32 L. J. Ch. 372; *Salisbury* v. *Petty*, 3 Hare, pp. 86, 93; *M'Donald* v. *Bryce*, 16 Bea. 581. Cf. *Gooch* v. *Slater*, 3 Jur. (N.S.) 881, where the phrase "with benefit of survivorship," used with reference to four different gifts, some immediate and others not, but all vested, was referred to testator's death in every instance; *Hearn* v. *Baker*, 2 K. & J. 383; *Vorley* v. *Richardson*, 8 D. M. & G. 126; *Naylor* v. *Robson*, 34 Bea. 571; *Wiley* v. *Chanteperdrix*, [1894] 1 Ir. 209; *Bowyer* v. *Currall*, 2 W. R. 328.

(*q*) *Stevenson* v. *Gullan*, 18 Bea. 590. See also *per* Wood, V.-C., *Re Hopkins' Trust*, 2 H. & M. at p. 414. *Gummoe* v. *Howes*, 23 Bea. pp. 184, 192, is not inconsistent with the rule. The gift was to A and B for their lives as tenants in common; and in case of the death of either without issue, to the survivor; but if either should die leaving issue, her share was given to her children: and *after the death of both* the whole was to be conveyed, transferred, or paid to the heirs of their bodies (construed children) share and share alike, or to the survivors or survivor of them: but if A and B should die without children, then over. It was held that a child of A which survived its parent but died before B was entitled to a share. In fact, the gift over after the death of both, which standing alone, might have given B a life interest in the share of A after her death, and have pointed out the death of B as the period of survivorship for all the children, was explained by the previous gift over, on the death of each parent, of her share to her children; so that survivorship in the several families was referred to a different period for each family.

(*r*) *Knight* v. *Poole*, 32 Bea. 548; *Re Fox's Will*, 35 Bea. 163; *Howard* v. *Collins*, L. R. 5 Eq. 349; *Re Coulden*, [1908] 1 Ch. 320. But see *Drakeford* v. *Drakeford*, 33 Bea. 43.

Result of the cases as to personalty.

"In this state of the authorities," as Mr. Jarman observes (*s*), "one scarcely need hesitate to affirm, that the rule which reads a gift to survivors simply as applying to objects living at the death of the testator, is confined to those cases in which there is no other period to which survivorship can be referred; and that where such gift is preceded by a life or other prior interest, it takes effect in favour of those who survive the period of distribution, and of those only."

If tenant for life dies before testator, death of the latter is the period.

If the tenant for life dies before the testator, the death of the latter, as the period of actual distribution, will also be regarded as the period of survivorship (*t*).

The same principle is clearly applicable where there is no prior particular bequest, but the gift to the legatees among whom the survivorship is to take place includes all of the prescribed class who may come into existence before a stated period. Thus, if a testator make a bequest to all the children of A who shall be born in their father's lifetime or within nine months after his death, as tenants in common, with benefit of survivorship; those only who survive their father or the nine months named are entitled to a share (*u*).

Distinction in regard to real estate rejected.

But the cases of *Garland* v. *Thomas*, *Edwards* v. *Symons*, and *Doe* v. *Prigg* (the last decided after *Cripps* v. *Wolcott*), made it doubtful whether this rule applied to devises of real estate. It is difficult to discover any ground for making them the subject of a different rule, unless a reason can be found in the greater tendency in devises of real estate towards a vesting of the interests of the devisees. The distinction was repeatedly pronounced to be unsound (*x*); and at length, in *Re Gregson's Trusts* (*y*), it was held by Knight Bruce and Turner, L.JJ., to be untenable. There a testator devised real estate to his wife for life, and on her death "to be shared share and share alike amongst the following persons, or the survivors of them, *viz.*" (naming them); and it was decided that the question being one of construction, and of the testator's intention, a forced interpretation could not be put on the words in order that the remainder might by early vesting escape the liability to destruc-

(*s*) First ed. Vol. II. p. 651.

(*t*) *Spurrell* v. *Spurrell*, 11 Hare, 54.

(*u*) *Hodson* v. *Micklethwaite*, 2 Drew. 294. See also *Blewitt* v. *Roberts*, Cr. & Ph. pp. 274, 283 (as to the £100 annuity); *Davies* v. *Thorns*, 3 De G. & S. 347.

(*x*) *Wordsworth* v. *Wood*, 1 H. L. C. 129; *Buckle* v. *Fawcett*, 4 Hare, 536.

(*y*) 2 D. J. & S. 428, reversing Wood, V.-C., who yielded to the authorities, 33 L. J. Ch. 531. Sir E. Sugden also had treated *Doe* v. *Prigg* as a binding authority: see 1 D. & War. at p. 499; *Re Belfast Town Council, Ex p. Sayers*, 13 L. R. Ir. 169. See also *Re Maunder*, [1902] 2 Ch. 875; [1903] 1 Ch. 451.

CHAPTER LV.

tion and other inconveniences of tenure incident to contingent remainders: and that here, no less than in the case of personal estate, survivorship must be referred to the death of the tenant for life.

Rule in *Cripps* v. *Wolcott* yields a contrary intention.

Re Poultney.

The rule in *Cripps* v. *Wolcott* is not only settled, but is one which the Court never seeks to evade by slight distinctions. Thus, in *Re Poultney* (*z*), the testator devised and bequeathed his estate to his wife for life, and after her decease upon trust to divide it between his eight named children. The last clause provided that in case of the death of one or more of his children their equal share or shares were to be equally divided between the survivors. The eight named children survived the testator, but one of them died in the widow's lifetime. It was held by the Court of Appeal that only those children who survived the widow were entitled to share, Farwell, J., saying "the rule in *Cripps* v. *Wolcott* (*a*) is too well settled to be whittled away now."

To surviving brothers or (by substitution) to their issue.

But the rule must yield to a context clearly indicating a contrary intention (*b*). Thus, in *Shailer* v. *Groves* (*c*), where a testator bequeathed £1,000 stock to his wife for her life, at her decease one-half of the produce to be received and divided amongst his *surviving* brothers and sister or (*d*) *their* issue, share and share alike, Sir J. Wigram decided that the word "surviving" had reference to the testator's death. He said: "It is clear that the testator must have intended a period of distribution later in point of time than the gift of the subject of distribution, and that he intended to substitute for the primary objects of his gift the issue of such of them as should die between the time of the gift and the time of the distribution."—"The fund must be divided in equal parts among the brothers and sisters surviving at the death of the testator. The issue of those who died in the lifetime of the tenant for life leaving issue will take the shares of the parents for whom they are substituted" (*e*).

(*z*) [1912] 2 Ch. 541.

(*a*) 4 Madd. 11.

(*b*) See *per* Wood, V.-C., 2 H. & M. at p. 414.

(*c*) 6 Hare, 162.

(*d*) The report 6 Hare gives "*and* their issue." But 11 Jur. 485 and 16 L. J. Ch. 367 give "or," and the briefs of counsel in the cause (which have been examined) agree with them: *Re Fox's Will*, 11 Jur. (N.S.) 734. These latter reports, however, differ from 6 Hare in a still more remarkable manner: for they represent the decision to have been, that the word "surviving" referred to the period of distribution; and the decree is drawn up in accordance with this latter view. But Mr. Hare's report of the judgment is probably correct; the word "their" being of equal force with the word "them" in *Tytherleigh* v. *Harbin*, 6 Sim. 329, and *Gray* v. *Garman*, 2 Hare, 268. See also Sir J. K. Bruce's judgment in *Kidd* v. *North*, 3 D. M. & G. at p. 951, second paragraph.

(*e*) See also *Re Hopkins' Trust*, 2 H. & M. 411; *Re Stannard*, 52 L. J. Ch. 355; *Evans* v. *Evans*, 25 Bea. 81. As to the assumption in the latter case

Rogers v. *Towsey.*

So in *Rogers* v. *Towsey* (*f*), where a testator bequeathed to each of his two sisters the interest of £5,000 stock for her life, and as each died the said stock to be equally divided between the testator's nieces A, B, C, D and E, *or the survivors of them*; he bequeathed one moiety of the residue to A, and the other moiety equally between B and C. "In case his niece C should not *survive him*, her children" to stand in her place, "and the same of any other of his nieces who might marry and leave children." The same Judge, assuming the general rule to be as stated in *Cripps* v. *Wolcott*, held that the last clause showed a special intent on the testator's part to refer the word "survivors" to his own death.

Rule where gift to survivors is contingent.

(3) *Gifts to Survivors upon a Contingency.*—"It is to be observed," says Mr. Jarman (*g*), "that where the gift to survivors is to take effect *upon a contingency*, none of the reasoning (infirm as that reasoning is) upon which it was held to refer to survivors at the death of the testator applies; for it cannot for an instant be contended that a tenancy in common is inconsistent with such a qualified survivorship. The only question, therefore, in such a case is, whether the gift was meant to extend to survivors indefinitely (*i.e.*, whenever the contingency should happen), or is restricted to survivorship within a given period after the testator's decease."

There is so much variety in the methods which testators adopt for indicating their intention that it is difficult to deduce any general rules. In *Jenour* v. *Jenour* (*h*), survivorship was confined to the death of the tenant for life, Sir W. Grant observing that he was always indisposed to indefinite survivorship. In *Roe* d. *Sheers* v. *Jeffery* (*i*), it seems to have been taken for granted that an executory limitation for life, to certain persons or the survivors, was not confined to survivors at the happening of the contingency; but as the devise had not at the death of the object fallen into possession, it does not appear whether survivorship was considered as indefinite, or as restricted to this period.

Executory devise to survivor referred to death of testator.

In *Doe* d. *Lifford* v. *Sparrow* (*k*), an executory limitation to survivors was held to refer to the death of the testator (the devise being to A and B in fee as tenants in common, and in case of the

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that "death without issue" meant death *in the lifetime of the tenant for life*, see *Olivant* v. *Wright*, 1 Ch. D. 346, *post*, p. 2105; and see and consider *Blackmore* v. *Snee*, 1 De G. & J. 455.

(*f*) 9 Jur. 575. Cf. *Bouverie* v. *Bouverie*, 2 Phil. 349.

(*g*) First ed. Vol. II. p. 651.

(*h*) 10 Ves. 562. See also *Bird* v. *Swales*, 2 Jur. (N.S.) 273.

(*i*) 7 T. R. 589.

(*k*) 13 East, 359.

death of either without children to the survivor); but this construction was aided by the context, particularly by a gift over of the entire property, in case *both* the devisees were dead *at the time of the decease of the testator* without children, from which the Court inferred, that in the clause in question, he contemplated death at the same period.

Contingent gift to survivors, when not restricted to period of distribution.

But where the original remainder is in terms limited upon the happening of an event (as attaining twenty-one), the non-happening of which occasions the gift over, survivorship is almost necessarily referable to that event, whenever it happens (*l*).

And generally if there is no special ground for restricting it, a gift to survivors on a contingency would seem to extend to survivors indefinitely, *i.e.*, whenever the contingency happens. It will appear in the next chapter (*m*) that if there be a gift to A for life, remainder to B, and if B dies without children then to C, the gift over *prima facie* takes effect whether the contingency happens before or after the death of A; and although, where the remainder is to several, with a gift over to survivors, words are frequently used which import a final division of the property and a closing of the trust at the death of the tenant for life, so as to restrict the operation of the gift over to that period (*n*), yet if there are no restrictive words, it would seem to follow from the rule referred to that "survivors" in this gift over means living when the contingency happens, whenever that may be (*o*).

Survivorship referred to time when contingency happens, though gift restricted.

Even assuming that a gift to survivors upon an express contingency is to be restricted to the period of the prior estate, so that those who survive that period take indefeasibly, the question still remains whether they *need* so survive, or whether it is sufficient that they are living when the contingency happens. The cases will be found to favour the latter position.

Thus, in *Crowder* v. *Stone* (*p*) Lord Lyndhurst decided that the shares which became subject to the operation of the bequest to the survivor and survivors were divisible among such of the legatees as were living at the time *when the events happened* on which the shares were to go over respectively.

So, in *Bright* v. *Rowe* (*q*), it must have been assumed that

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(*l*) *Carver* v. *Burgess*, 18 Bea. 541; 7 D. M. & G. 96.

(*m*) *O'Mahoney* v. *Burdett*, L. R. 7 H. L. 388.

(*n*) *Olivant* v. *Wright*, 1 Ch. D. 346; *Besant* v. *Cox*, 6 Ch. D. 604.

(*o*) This would seem to be the rule where the original gift is immediate: see *per* Lord Hatherley, *Bowers* v. *Bowers*, L. R. 5 Ch. pp. 244, 247. In *Clark* v. *Henry*, L. R. 11 Eq. 222; 6 Ch. 588, the prior legatees were "to have the control" of their shares at twenty-five; survivorship was therefore referred to that age.

(*p*) 3 Russ. 217. *Marriott* v. *Abell*, L. R. 7 Eq. 478, is *contra*, *sed qu.*

(*q*) 3 My. & K. 316. See also *Ranelagh* v. *Ranelagh*, 2 My. & K. 441; *Fletcher* v. *Ashburner*, 1 B. C. C. 497 (where the point appears to have been assumed).

the survivorship intended was a survivorship at the time when the several contingencies happened; since otherwise the M.R. could not have decided (as he did) that the personal representative of the child who died without issue in 1829, before the shares became payable, was entitled under the gift to "survivors" to an interest in the share of the child who died in 1826.

And in *Ive* v. *King* (*r*), where a testator devised and bequeathed property to his wife for life, remainder to trustees in trust to sell, and gave one moiety of the proceeds to his wife's sister and brothers (naming them), as tenants in common; "and in case of the death of any or either of them (which was held to mean death before the wife, as expressed in the gift of the other moiety), then their respective shares to their children, if any, and if not, then to the survivors of them, share and share alike." A, one of the brothers, died a bachelor before the testator in the wife's lifetime; and it was held by Sir J. Romilly, M.R., that another brother, who survived A, and the testator, though he afterwards died in the wife's lifetime, was entitled under the gift to survivors to participate in the share of A.

Survivorship held to refer to the event.

It seems also that where the remainder is, not to several or the survivors (as in *Cripps* v. *Wolcott*), but to several, and *if any of them die* before the tenant for life, to the survivors, it will be held to mean survivorship *inter se* and not at the death of the tenant for life. Thus in *White* v. *Baker* (*s*), a sum was given in trust for A for her life, and after her death in trust to pay the sum to B and C in equal shares, and in case of the death of either of them in the lifetime of A, then in trust to pay the whole to the survivor of them the said B and C, his executors, administrators and assigns. It was held by Lord Campbell, with Knight-Bruce and Turner, L.JJ., that on the death of B in the lifetime of A the whole vested absolutely in C, not liable to be divested if he afterwards died in the lifetime of A. Sir G. Turner said (*t*): "Where there is a bequest to A for life, and after his death to B and C or the survivor of them, some meaning must of course be attached to the words 'the survivor.' They may refer to any

White v. *Baker*.

(*r*) 16 Bea. pp. 46, 57. Note that the alternative gift to children, not being "in case any brother should *leave* children," did not assist the construction. Note also that "survivors" was held to denote a *class*, *i.e*, to include none who did not also survive the testator, 16 Jur. p. 491; but see *Willetts* v. *Willetts*, 7 Hare, 38.

(*s*) 2 D. F. & J. 55, reversing Romilly, M.R., 29 L. J. Ch. 577, 6 Jur. (N.S.) 209, whose previous decision in *Cambridge* v. *Rous*, 25 Bea. 409 ("the share of each who shall die to be divided among the survivors"), appears to be discredited by this reversal. *White* v. *Baker* was followed in *Re Wood*, 130 L. T. 408.

(*t*) This statement is approved in *Re Poultney*, [1912] 2 Ch. 541, 544, 545.

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one of three events : to one of the persons named surviving the other; to one of them only surviving the testator; or to one of them only surviving the tenant for life : and in the absence of any indication to the contrary they are taken to refer to the last event, as being the most probable one to have been referred to. But where, as in the present case, the bequest is to A for life and after his death to B and C, and in case either of them dies in the lifetime of A, the whole to the survivor, it is plain that the words in their natural import refer to the one surviving the other; and the question is not to which of the events above mentioned the testator intended to refer, but whether there is any context to alter the ordinary meaning of the words which he has used." He also thought the case was made stronger by the words "his executors," etc., being added to the gift in favour of the survivor (*u*); in which he agreed with Lord Campbell. But he added that the case needed no such support, and he "preferred deciding it upon the more general ground."

Scurfield v. *Howes.*

Both Judges pointedly approved of *Scurfield* v. *Howes* (*x*), and treated it as directly in favour of their decision. There the bequest was to A for life, and after her decease to her two children share and share alike, but if either of them should die before the decease of their mother, the whole to the survivor of them (*y*). Both died in A's lifetime, and it was held that the legacy belonged to the personal representatives of the survivor. It seems, therefore, that *White* v. *Baker* cannot fairly be said to have turned on the particular language of the will (*z*).

(*u*) As contrasted (it may be presumed) with their absence from the original gift to the two.

(*x*) 3 B. C. C. 90. See also *per* Shadwell, V.-C., *Antrobus* v. *Hodgson*, 16 Sim. at p. 450. But this was heard as a short cause, and the successful party being legal representative of both children was entitled *quacunque via.*

(*y*) The words "of them" are supplied from R. L., 6 Jur. (N.S.) p. 592. But Lord Campbell stated the case without them, and in other cases they appear not to have weighed in favour of survivorship *inter se.*

(*z*) See, however, *per* Wood, V.-C., L. R. 1 Eq. at p. 298. Upon the question discussed in the text frequent reference is made to a Scotch case of *Young* v. *Robertson*, 4 Macq. pp. 314, 337; 8 Jur. (N.S.) 825, where the testator (or truster) gave the residue of his estate in trust for his wife for life, and "to pay the same after the death of the longest liver of me and my said wife to and among" six persons (named); "declaring that if any of them should die without leaving issue before his or her share vest in the party or parties so deceasing, the same shall belong to and be divided equally among the survivors of" the six. A, one of the six, died without issue; afterwards B, another of them, died leaving issue; then the wife died. It was held in D. P. that B took no part of A's share. But none of the English cases in point were cited, nor was the question decided in them alluded to, the only contest being whether "survivors" meant living at the death of the testator (as had been decided in Scotland) or at the death of the wife, and no third construction being suggested. Strictly the decision bears only upon Scotch law; and although the Scotch and English rules on the subject were treated as identical, it is submitted that the case ought not to be considered as having *sub silentio* overruled the English decisions.

Young v. *Robertson.*

Re Pickworth.

But in *Re Pickworth* (*a*), where the testatrix gave residuary trust moneys upon trust to pay the interest to her sister T. during her life, and after her death to pay and divide the said trust moneys equally between the testatrix's two sisters F. and S., share and share alike, "and if either of my said sisters shall be then dead, . . . upon trust for the survivor of my said sisters absolutely," it was held that the period of distribution was the death of T., and as both S. and F. predeceased T. the original gift in favour of S. and F. was not divested in favour of F., who survived S. (*b*). Whether this case can stand with *Scurfield* v. *Howes* it is not easy to say, but *Scurfield* v. *Howes* was not expressly disapproved by the majority of the Court of Appeal. *Re Pickworth* can be distinguished from *White* v. *Baker* on the ground that the gift over was "if *either* of my sisters shall be then dead"; and the Court decided that "either" did not mean both, so that the contingency had not occurred, but in *Scurfield* v. *Howes* the words were "if either of them should die before the decease of their mother," so that here either was taken to mean one or both.

In this state of the authorities it is not easy to state which is the correct rule of construction; probably there is no rule. Rigby, L.J., pointed out in *Re Pickworth* that the construction adopted by the majority of the L.JJ. was one in which the word survivor in the same phrase included two meanings: "first the survivorship as between the sisters, and secondly a survivorship as between the object of the gift and the tenant for life"; it is certainly unfortunate that the L.JJ. did not expressly overrule *Scurfield* v. *Howes*, or expressly state that they approved it.

The construction which reads survivors as those who are living when the contingency happens is confirmed if the gift to them is in the alternative with another which clearly points to that time; as, where the shares of any of the original legatees in remainder are given over in case of their death *leaving* issue to such issue, but if they leave no issue, then to the survivors (*c*).

Distinction between gift over of "share" of deceased legatee, and gift over of whole fund.

There is perhaps some difference between a gift to survivors of the whole fund and a gift to survivors of the share of the deceased legatee. In the former case the point of new departure is the death of the tenant for life, in the latter the death of the legatee. The former is therefore more favourable than the latter to reading "survivor" as "living at the death of the tenant for

(*a*) [1899] 1 Ch. 642. See also *Wiley* v. *Chanteperdrix*, [1894] 1 Ir. 209 (where the words were "with benefit of survivorship").

(*b*) Compare *Re Deacon's Trusts*, 95 L. T. 701, which followed *Jones* v. *Davies*, 28 W. R. 455.

(*c*) *Wilmot* v. *Flewitt*, 11 Jur. (N.S.) 820. *Qu.* whether *Cambridge* v. *Rous* 25 Bea. 409, *ante*, p. 2069, n. (*s*), is not inconsistent with this case also.

life." But in *Scurfield* v. *Howes* and *White* v. *Baker*, although the gift was of the whole, and not of the share, "survivor" was held to mean him who outlived the other legatee. In fact no such distinction has ever been judicially noticed; and the *ratio decidendi* in *White* v. *Baker* would seem to leave it little room to operate. In *Watson* v. *England* (*d*) a testatrix having a power to appoint a sum of £1,500 appointed it to her husband for life, and after his death to be equally divided among the five daughters of her sister: if any of the said daughters should die in the husband's lifetime leaving issue, such issue to take their mother's share; but in case any of them should die during the husband's lifetime without issue, then "the said sum of £1,500 shall be divided, share and share alike, amongst the *surviving* said daughters." It was held by Sir L. Shadwell, V.-C., after some fluctuation of opinion, that the husband's death was the time to which survivorship was to be referred.

What excludes the sense of survivorship *inter se*.

The sense of survivorship *inter se* is excluded where the vesting of the remainder or other future gift is originally postponed to the death of the tenant for life (*e*), or other future event (*f*). So, where there was a gift for life, with remainder in fee to three persons by name, and "in the event of the death of either in the lifetime of" the tenant for life, his share was to "be transferred to the survivors, and, *if only one should be living*, then to him or her so surviving"; it was held that this was not a survivorship among the remaindermen, but had reference to the death of the tenant for life (*g*). In this case the concluding words seem to point clearly to one fixed period. And a similar consideration may probably explain another case (*h*) where, after a life interest, the gift was to three persons by name, in equal shares, "or in case of the demise of each or either of them to be divided between the survivors or survivor *or* their representatives." It was held that survivors meant those living at the death of the tenant for life, and that as all three were dead, the original gift was not defeated. The words appear to mean, "to the survivors or survivor if any, but *if none* then to the representatives of the original legatees," which must necessarily have reference to one fixed point. So if there be a gift over of the whole in case all the legatees (amongst whom survivorship is to take place) should die before the tenant for life, those only who survive him will take, since the final gift over explains what

Page v *May*.

(*d*) 15 Sim. 1.
(*e*) See *Essex* v. *Clement*, 30 Bea. 525.
(*f*) *Re Hunter's Trusts*, L. R. 1 Eq. 295.
(*g*) *Littlejohns* v. *Household*, 21 Bea. 29.
(*h*) *Page* v. *May*, 24 Bea. 323; but as the successful claimant was legal personal representative of all three, the point here considered did not require decision.

is meant by the indefinite terms of survivorship previously used (*i*).

It is inevitable that the meaning of a word which is so absolutely dependent on the context for any meaning at all should sometimes have to be spelt out from ambiguous expressions. Thus in *Maddison* v. *Chapman* (*k*), where a testator gave all his property in trust, upon his younger daughter attaining twenty-one, to be valued and divided into three equal parts without selling the land; one part to be for his wife and another for each of his two daughters, and at the death of his wife her share to be divided between the daughters; with a proviso that if either daughter should die *before a division of the property* should have been made as directed, leaving no surviving issue, then the part of the deceased should be given *to her surviving sister*; but if either of them should die and leave surviving issue, then her part should be equally divided amongst her surviving children; and until the younger daughter attained twenty-one the income was to be applied for the benefit of the wife and daughters. Both daughters died unmarried before the widow, the younger under age; and it was held by Sir W. Wood, V.-C., that there was no survivor within the proviso, and that the original gift to the daughters, which he held to be vested, remained intact. Where there is a gift to A for life, he observed, and after the death of A to B and C, and the survivor of them, the testator must, in the survivorship clause, be conceived as contemplating personal enjoyment by the person indicated; survivorship is therefore referred to the period of possession. In the event of both dying before the period of division, the testator could have no reason for preferring the one who happened to be the longer liver (*l*), for he did not know which it would be: there was no assignable motive for his giving the whole to that one, except the improbable wish that the interest should be vested at the earliest possible period. In *White* v. *Baker*, the L.J. had considered that the express words, "if either of them die in the lifetime of A," made a sufficient distinction. That decision had created some difficulty in his (the V.-C.'s) mind, when coupled with the line of cases down to *Wagstaff* v. *Crosby* (*m*), before K. Bruce, V.-C. (one of the Judges who decided *White* v. *Baker*), and *Page* v. *May* (*n*). In the case before him, he added, there was no third

Maddison v. *Chapman.*

(*i*) *Daniel* v. *Gosset*, 19 Bea. 478. Compare *Bouverie* v. *Bouverie*, 2 Phil. 349.

(*k*) 1 J. & H. at p. 478

(*l*) But here it was "if either die leaving no issue."

(*m*) 2 Coll. 746, *ante*, p. 1343. The bequest was in the form first put by Sir G. Turner, *viz.*, to several "and the survivors or survivor of them."

(*n*) 24 Bea. 323, as to which *vide ante*, p. 2072, n. (*h*).

person, tenant for life: the mother and daughters were the objects both of the original gift and the gift over. Until the younger daughter attained twenty-one, the benefit was given in one way, afterwards in another to the same persons. There was, therefore, no question of vesting the interest at the earliest time, so as to make it independent of a collateral event, such as the death of a third person (*o*). Throughout, and particularly in the expression, "the part of the deceased shall be given to her surviving sister," the testator was looking at what was to be done when the younger child attained twenty-one; if at that time either daughter was dead, her share was to be handed over to her issue, if any then surviving; if none, then to the other sister, if then surviving.

Special gift to survivors explanatory of prior general one.

"It sometimes happens," says Mr. Jarman (*p*), "that a testator, after giving to several persons and the survivors generally, goes on to make an express gift to survivors, to take effect in a particular event, thereby explaining the sense in which he used the word in the former instance. As in the case of *Weedon* v. *Fell* (*q*), where A bequeathed a sum of money in trust for his wife for life, and after her decease to divide the whole among his four children, share and share alike, *and the survivors*, but not before they should have respectively attained twenty-one or days of marriage; for his intent was that, *if any of his four children should die before twenty-one or days of marriage*, then his, her, or their share so dying should go and be equally divided *among the survivors*. It was held, that a child attaining twenty-one was entitled though she died in the lifetime of her mother."

(4) *Rule where the Period of Distribution depends on Two Events, one Personal, the other not.*—"Where the time of distribution depends upon the happening of two events, one of which is personal, and the other is not personal, to the legatees (as where the gift is to children attaining twenty-one, and the distribution is postponed until the youngest object attains that age), the Courts strongly incline to construe a gift to the survivors as referring to the former event exclusively, in order to arrive at what is considered to be a more reasonable scheme of disposition than that of rendering the interests of the legatees liable to be defeated by the event of their dying before the time to which, for some reason irrespective of the personal qualifications of the legatees, the distribution was postponed.

Survivorship referred to majority in preference to another event.

(*o*) But *White* v. *Baker* turned wholly on the "natural import" of the words used.

(*p*) First ed. Vol. II, p. 653.

(*q*) 2 Atk. 123. See also *Rogers* v. *Towsey*, 9 Jur. 575, *ante*, p. 2067.

Crozier v. *Fisher.*

"Thus, where (*r*) a testator devised certain leasehold property to his wife for life, then to his daughter for life, and at her death to her husband for life, and at his decease to a trustee upon trust to receive the rents for the benefit of all the children of the daughter. The testator then proceeded thus :—'And my further will is, that my said trustee shall from time to time, as the rents become due, pay unto such child or children a just proportion of such interest as they shall arrive at their age of twenty-one years, and to place the interest of the infants' shares in the three per cents. Consolidated Bank Annuities, for their own sole use and benefit, and so on alternately till the youngest child shall arrive at his or her age of twenty-one years, and then all the said children *or the survivors* of them to be let into full possession of all the said estates, share and share alike.' The question was, at what time the interest of the children vested. Sir J. Leach, M.R., observed that the Court would not, unless forced by the plainest words, adopt a construction by which the interest of a child of full age, and settled in life, would be divested, if he happened to die before the youngest child attained twenty-one : that here the word 'survivor' admitted of another and more rational meaning, namely, surviving so as to attain twenty-one; that, therefore, every child attaining twenty-one acquired a vested interest in his proportion of the capital; and that the children who died before attaining twenty-one took, during their lives, a vested interest in that proportion of the rents and profits which corresponded to their presumptive shares; but that such interest determined on their deaths" (*s*).

Survivorship referred to majority by force of gift over.

Contrary effect of gift over on death of all before tenant for life.

In cases of this class a gift over may determine the testator's meaning. For if there is a gift over on the death of all the class under twenty-one, it is almost inevitable to refer the period of survivorship to that age (*t*). On the other hand, if the prior bequest is followed by a gift over on the death of all the previous legatees (among whom the survivorship is to take place) in the lifetime of the tenant for life, the death of the tenant for life is the period to which survivorship is to be referred (*u*).

Gift to survivors of a class, without previous gift to the class.

Again, in *Turing* v. *Turing* (*x*), where a testator gave a sum of money to trustees for his wife for life, and after her death, in trust, as to one-fifth of that sum, for his daughter for life, and

(*r*) *Crozier* v. *Fisher*, 4 Russ. 398.

(*s*) Other cases are, *Tribe* v. *Newland*, 5 De G. & S. 236; *Knight* v. *Knight*, 25 Bea. 111; *Berry* v. *Briant*, 2 Dr. & Sm. 1; *Re Johnson's Trusts*, 10 L. T. (N.S.) 455; *Corneck* v. *Wadman*, L. R. 7 Eq. 80. See also *Reid* v. *Worsley*, 14 Jur. 325, and *Hodson* v. *Micklethwaite*, 2 Drew. 294.

(*t*) *Salisbury* v. *Lambe*, 1 Ed. 465, Amb. 383 (where the only reference to twenty-one was in the gift over); *Bouverie* v. *Bouverie*, 2 Phil. 349; *Alty* v. *Moss*, 34 L. T. (N.S.) 312.

(*u*) *Daniel* v. *Gosset*, 19 Bea. 478; *Fisher* v. *Moore*, 1 Jur. (N.S.) 1011.

(*x*) 15 Sim. 139.

upon her demise the interest to be appropriated for the use of any her child or children until they reached the age of twenty-one, and *then* the principal sum *to be paid to the survivor or survivors of the children* of his said daughter, share and share alike: it was held by Sir L. Shadwell, V.-C., that the word "survivors" related to the daughter's death, and not to the children's majority. He distinguished *Crozier* v. *Fisher*, on the ground that there was in that case a clearly vested interest given at twenty-one, which the word "survivors" (rather ambiguously used) was not sufficient to divest.

And in some other cases where the words of survivorship have not been distinctly connected with majority, they have been referred to the death of the tenant for life, or the time when the youngest child attained majority, as the case required.

Gift to A for life, and at her decease to her surviving children at twenty-one.

Thus, in *Huffam* v. *Hubbard* (*y*), where the gift was "to A for life, and at her decease to her surviving children when they should have attained their twenty-one years, share and share alike," Sir J. Romilly, M.R., said that *Crozier* v. *Fisher* was a peculiar case, and different from the one before him; and he held that only the children surviving A took, according to the rule in *Cripps* v. *Wolcott* that survivorship has reference to the period of distribution.

To several as tenants in common *for life*, and to survivor, with gift over *after death of survivor.*

(5) *Words amounting to an Express Gift to the Survivor.*—Mr. Jarman continues (*z*): "Where a gift is made to several persons as tenants in common for life, and the survivor, with a limitation over after the death of the survivor, indicating therefore unequivocally that the survivor is to take *at all events*, the testator is considered to refer to survivorship indefinitely, and not to survivorship at his own death.

Doe v. *Abey.*

"Thus, in *Doe* d. *Borwell* v. *Abey* (*a*), where the testator devised to his three sisters, for and during their joint natural lives, *and the natural life of the survivor of them, to take as tenants in common, and not as joint tenants*; and after the determination of their respective estates, then to trustees during the lives of his said sisters, and the life of the survivor of them, to preserve contingent estates; and after the respective deceases of his said three sisters, *and the decease of the survivor* of them, then over; Lord Ellenborough observed, that, to take as tenants in common is, correctly speaking, repugnant to taking with benefit of survivorship; but if those words are understood to mean that they were to take it as tenants in common, which

Survivorship held to be indefinite.

(*y*) 16 Bea. 579. See also *Pope* v. *Whitcombe*, 3 Russ. 124; *Dorville* v. *Wolff*, 15 Sim. 510; *Hind* v. *Selby*, 22 Bea. 373.

(*z*) First ed. Vol. II. p. 655.

(*a*) 1 M. & Sel. 428.

they might do with benefit of survivorship, then the only repugnance seemed to be in the words 'and not as joint tenants' (*b*). 'I would (said his Lordship) preserve the words "to take as tenants in common." The words tenants in common are of a flexible meaning, and may be understood, that although they should take by survivorship as joint tenants, yet the enjoyment was to be regulated amongst them as tenants in common. The prevailing intention of the testator seems to have been, that the estate should not go over until the death of the survivor.' And Mr. Justice Bayley observed with great truth, 'A tenancy in common, with benefit of survivorship, is a case which may exist without being a joint tenancy, because survivorship is not the only characteristic of a joint tenancy' (*c*).

Remarks on *Doe* v. *Abey*.

"It is evident, that, by 'benefit of survivorship,' the learned Judge meant *a gift to the survivor*; and his observation goes to this: that, although survivorship is not an *incident* to a tenancy in common, yet an express gift to survivors is consistent with it. It is observable, however, that there was no express gift to the survivor, but the Court seems to have implied one (*d*). The principle, however, is the same.

"It remains to be observed, that, in devises of estates of inheritance, for the avowed purpose of reconciling words of division or severance with a gift to the survivor, the devisees have been held to be joint tenants for life, and tenants in common of the inheritance in remainder.

Words of severance confined to the inheritance.

"Thus, in *Barker* v. *Giles* (*e*), where the testator devised his real estate to be sold to pay debts and legacies, and the surplus of the money arising from the sale to be laid out in lands, to be settled to the use of J. and R., *and the survivor of them*, their heirs and assigns for ever, *equally to be divided between them, share and share alike*: it was held that they were joint tenants for life, with several inheritances, so that by the death of J. in the lifetime of the testator R. took the whole for his life, and the devise of the moiety of the inheritance lapsed.

Barker v. *Giles*.

"But in *Blisset* v. *Cranwell* (*f*), where the testator devised to his two sons and their heirs, *and the longest liver of them*,

Limitation to survivor disregarded.

(*b*) But are not these words susceptible of the same explanation? They were not to enjoy as joint tenants, with a right of accruer, but as tenants in common, with an *express* or implied limitation to survivors.

(*c*) See also *Foley* v. *Gallagher*, 2 L. R. Ir. 389, where a tenancy in common among the survivors was converted into a joint tenancy by 2 W. 4, c. 17, s. 9, sub-s. 2; *Taaffe* v. *Conmee*, 10 H. L. C. 64, and other cases cited *ante*, p. 1777.

(*d*) This case may therefore be added to those cited *ante*, p. 618.

(*e*) 2 P. W. 280; 9 Mod. 157; 14 Vin. 487; 2 Eq. Ca. Ab. 536, affirmed on appeal 3 B. P. C. Toml. 104. See also *Folkes* v. *Western*, 9 Ves. 456; *Haddelsey* v. *Adams*, 22 Beav. 266.

(*f*) 1 Salk. 226; 3 Lev. 373.

equally to be divided between them and their heirs, after the death of his wife; it was held that though it was given to them and the survivor, yet that the last words (namely, the words of division) explained what the testator meant by the word 'survivor,' that the survivor should have an equal division with the heirs of him who should die first.

"In *Stones* v. *Heurtly* (*g*) Lord Hardwicke recognised the authority of this case, and applied the same construction to a devise of the residue of the testator's estate 'to be equally divided among his three younger children, D., F., and M., *and the survivor of them*, and their heirs for ever.'

Observations on the two last cases.

"The objection to the construction adopted in the two last cases is, that it renders the gift to the survivor wholly inoperative. It is probable that the Courts at this day would incline to construe such gift as intended to provide for the event of any of the objects dying in the lifetime of the testator, as in *Smith* v. *Horlock* (*h*); at any rate in such a case as *Stones* v. *Heurtly*, where there was no other period to which it could be referred. The other case, *Blisset* v. *Cranwell*, would raise the question (to which so considerable a portion of the present chapter has been devoted) whether it meant survivorship at the time or the period of division. *Barker* v. *Giles* (*i*) is distinguishable, inasmuch as the words of severance were not, as in the other cases, *necessarily* applied to the estate for life. The authority of this case was recognised in the recent case of *Doe* d. *Littlewood* v. *Green*" (*k*).

This chapter may, like the first section of it, be concluded with a caution. "Certainly this word 'survivor,'" said Sir W. P. Wood, V.-C., "is one that ought to be avoided by any person who is not a consummate master of the art of conveyancing, for I suppose no word has occasioned more difficulty" (*l*).

(*g*) 1 Ves. sen. 165.
(*h*) 7 Taunt. 129.
(*i*) *Ante*, p. 2077.
(*k*) 4 M. & Wels. 229.
(*l*) *Re Gregson's Trusts*, 33 L. J. Ch. at p. 532.

CHAPTER LVI.

WORDS REFERRING TO DEATH SIMPLY, WHETHER THEY RELATE TO DEATH IN THE LIFETIME OF THE TESTATOR.

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I. *Rule where the Gift is immediate* 2079

II. *Rule where the Gift is future* 2083

III. *Effect where the Gift is of a limited Interest* 2087

Scope of this chapter.

In the cases treated of in this chapter, the difficulty of construction arises from death being referred to by testators as a contingent event. Such cases must be distinguished from those in which property is given to A, and "at" or "after" his death to someone else; there the question is whether A takes absolutely or only a life interest (*a*). There are also cases in which a gift over in the event of a person's death, although apparently referring to death simply, implies some additional contingency (*b*). These cases are discussed in the next chapter.

"In case of the death," etc., to what period referred.

I.—Rule where the Gift is immediate.—The principle is thus stated by Mr. Jarman (*c*): "Where a bequest is made to a person, with a gift over *in case of his death*, a question arises whether the testator uses the words 'in case of,' in the sense of *at* or *from*, and thereby as restrictive of the prior bequest to a life interest, *i.e.* as introducing a gift to take effect on the decease of the prior legatee under all circumstances (*d*), or with a view to create a bequest in defeazance of or in substitution for the prior one, in the event of the death of the legatee in some contingency. The difficulty in such cases arises from the testator having applied terms of contingency to an event of all others the most certain and inevitable, and to satisfy which terms it is necessary to connect with death some circumstance in association with which it is contingent; that circumstance naturally is the time of its happening; and such time, where the bequest is immediate (*i.e.* in possession), necessarily is the death of the

Where the bequest is immediate.

(*a*) *Re Russell*, 52 L. T. 559; *Re Percy*, 24 Ch. D. 616, and other cases cited in Chap. XXXIV, *ante*, p. 1167.

(*b*) *Re Crofton's Trusts*, 7 L. R. Ir. 279, stated *ante*, p. 833.

(*c*) First ed. Vol. II, p. 659. Approved by Sir James Hannan in *Watson* v. *Watson*, 7 P. D. 10.

(*d*) This was clearly the intention of the testator in *Re Bourke's Trusts*, 27 L. R. Ir. 573, although effect was not given to it; see Chap. XXXIV, *ante*, p. 1167.

testator, there being no other period to which the words can be referred.

"Hence it has become an established rule, that where the bequest is simply to A, and *in case of his death*, or *if he die*, to B, A surviving the testator takes absolutely (*e*).

"The case of *Trotter* v. *Williams* (*f*) appears to have carried this construction to a great length. J. S. bequeathed to A £500, to B £500, and in like manner gave £500 apiece to five others, and *if any died*, then her legacy, and also the residue of his personal estate, to go to such of them as should be *then* living, equally to be divided betwixt them all. The Court held, that these words referred to a dying before the testator, so that the death of any of the legatees after would not carry it to the survivors.

"*If any die*," held to mean *in the lifetime of the testator.*

"The word 'then' seemed to present some difficulty in the way of the construction adopted in this case. It followed immediately after the reference to the death of the legatees, and might with great plausibility have been held to refer to that event whenever it should happen; for a testator could hardly intend to make existence at a period anterior to his own death a necessary qualification of a legatee. This case exhibits the extreme point to which the construction in question has been carried" (*g*).

Where a testator gave legacies to three persons in specified shares and directed that, if any of the three should die, his share should go to the others; the testator and one of the legatees were drowned in a collision of two steamships, and there was nothing to show which was the survivor: it was held by Fry, J., that according to the rule in question die must mean die in the testator's lifetime, and that the gift over of his share failed (*h*).

"In case of the death of either before the other."

The rule has been held to apply where, after a gift to several, there was a bequest over "in case of the death of either in the lifetime of the others or other"; on the ground that the additional words did not make the event of death more contingent: it being a certainty that one must die in the lifetime of

(*e*) *Lowfield* v. *Stoneham*, 2 Stra. 1261; *Northey* v. *Burbage*, Pre. Ch. 471; *Hinckley* v. *Simmons*, 4 Ves. 160; *King* v. *Taylor*, 5 Ves. 806; *Turner* v. *Moor*, 6 Ves. 557; *Cambridge* v. *Rous*, 8 Ves. 12; *Webster* v. *Hale*, *ib.* 410; *Ommaney* v. *Bevan*, 18 Ves. 291; *Wright* v. *Stephens*, 4 B. & Ald. 574; *Re Bourke's Trusts*, 27 L. R. Ir. 573; *Re Neary's Estate*, 7 L. R. Ir. 311. But see *Chalmers* v. *Storil*, 2 V. & B. 222. As to a similar question arising on the word *or*, as in a gift to A "or his children," see *ante*, pp. 1286 *seq.*; also 1 Russ. 165.

(*f*) Pre. Ch. 78; 2 Eq. Ca. Ab. 344, pl. 2. See also *Taylor* v. *Stainton*, 2 Jur. (N.S.) 634.

(*g*) See the case of *Re Bourke's Trusts*, *supra*, stated *ante*, p. 1167.

(*h*) *Elliott* v. *Smith*, 22 Ch. D. 236.

the other (*i*). Thus, in *Re Fisher* (*k*) the testator left property in trust for A for life, and at her death to go to his two nieces B and C in equal shares, "should one of my nieces die before the other, the other surviving niece to take the whole. Should my nieces die without lawful issue," the estate to be sold and divided amongst other persons. The tenant for life died after the testatrix. B died after the tenant for life, leaving children. Held, that there must be read into the gift the contingency of a niece dying in the lifetime of the tenant for life, and that C was only entitled to one-half and the executors of B to the other.

Cases of contrary construction.

"There are, however," says Mr. Jarman (*l*), "a few cases of immediate bequests in which the words under consideration have been construed to refer to death at *any* time, and not to the contingent event of death in the lifetime of the testator; but in each there seems to have been some circumstance evincing an intention to use the words in that rather than in the ordinary sense. Thus, the circumstance of the testator having bequeathed other property to the same person, to be 'at her own disposal,' has been considered to indicate that the testator had a different intention in the instance in question.

"*In case of her demise,*" construed *at* her death.

"In *Billings* v. *Sandom* (*m*) the testator, being at Gibraltar, bequeathed to his sister A (who was in England) £1,000, and *in case of her demise* he gave to B £800, and to C £200. And he bequeathed unto A, whom he left executrix, whatever goods, chattels and money should be due to him at the time of his decease '*to be disposed of as she should think proper.*' Lord Thurlow said the testator intended to give a share of his bounty to his sister, and also to the others. The word 'and' implied this; therefore she should take it for life, and then they should take it. As to the residuary devise, he meant that she should take that unfettered, at her own disposal, *but the other fettered by the gift over.* This case has been referred to by Sir W. Grant (*n*) as decided upon the contrast afforded by the residuary clause.

"In case of death happening," etc., not confined to death *in life time of the testator.*

"In *Nowlan* v. *Nelligan* (*o*) the bequest was in these words:—'I give and devise unto my beloved wife H. N. all my real and personal estate: I make no provision expressly for my dear daughter knowing that it is my dear wife's happiness, as well as mine, to see her comfortably provided for; *but in case of death*

(*i*) *Howard* v. *Howard*, 21 Bea. 550. See *Underwood* v. *Wing*, 4 D. M. & G. at p. 659; 8 H. L. C. at p. 199 (*Wing* v. *Angrave*).
(*k*) [1915] 1 Ch. 302.
(*l*) First ed. Vol. II, p. 660.
(*m*) 1 B. C. C. 393.
(*n*) 8 Ves. at p. 22.
(*o*) 1 B. C. C. 489.

happening to my said wife, in that case I hereby request my friends S. and H. to take care of and manage to the best advantage for my daughter H. all and whatsover I may die possessed of.' Lord Thurlow said it was impossible to tell with precision what was the testator's meaning, but he thought it too much to determine that 'in case of death happening' meant dying in the husband's (*i.e.* the testator's) lifetime; that therefore the meaning must be supposed to be in the event of her death *whenever it should happen.*

Sir W. Grant's remark on *Nowlan* v. *Nelligan.*

"Of this case Sir W. Grant (*p*) has said, 'It was evident that some benefit was intended for the daughter, but it was doubtful, as the extent was not clearly expressed, whether it could be made effectual by imposing a trust upon the will (*quære* wife?). Some benefit, however, was evidently intended for the daughter, and none could be assured to her except by limiting her mother to an interest for life.'"

In *Lord Douglas* v. *Chalmer* (*q*), a testatrix gave her residue to D. and in case of her decease to her children: it was held that D. took only a life interest. Lord Loughborough's decision, which is, perhaps, difficult to reconcile with the other authorities, appears to have turned partly on a presumption that the testatrix intended to provide for D.'s children and partly on a specific bequest to D., which was inconsistent with the supposition that she took the whole interest in the residue. But, as Mr. Jarman remarks (*r*), "the reliance which was placed on these circumstances shows that Lord Loughborough did not intend to controvert the general rule, which is still more apparent from his subsequent decision in *Hinckley* v. *Simmons* (*s*), where a bequest of all the testatrix's 'fortune' to A, and '*in case of* her death' to B, was held to confer an absolute interest on A surviving the testatrix. And this has been followed by several other decisions (*t*).

Remark on *Lord Douglas* v. *Chalmer.*

No distinction in gifts to children.

"It might seem, perhaps, that *Lord Douglas* v. *Chalmer* goes to establish an exception to the construction in question, where the first gift is to the parent and the second to the children; but this hypothesis is not only unsound in principle, but is contradicted by subsequent authority" (*u*).

And it is, of course, equally immaterial that the substituted gift confers a life interest only on the first taker, and the ulterior interest on a third person (*x*).

(*p*) 8 Ves. at p. 22.
(*q*) 2 Ves. jun. 501.
(*r*) First ed. Vol. II, p. 663.
(*s*) 4 Ves. 160.
(*t*) See cases cited *ante*, p. 2080.
(*u*) *Webster* v. *Hale*, 8 Ves., at p. 411; *Slade* v. *Milner*, 4 Madd. 144; *Schenk* v. *Agnew*, 4 K. & J. 405.
(*x*) *Crigan* v. *Baines*, 7 Sim. 40.

"In the event of the death of either," similarly construed.

Another case exemplifying the construction now under consideration is *Clarke* v. *Lubbock* (*y*), where a testator bequeathed the residue of his property to A and B, the interest to be paid for their support; *but in the event of the death of either*, the whole of the interest to be paid to the survivor; and on his or her demise, should they leave no children, then over: Sir J. K. Bruce held that, both A and B having survived the testator and left children, each was entitled to one moiety, the words in question being construed to refer to death in the testator's lifetime.

Rule of construction strictly applied.

So firmly is the rule of construction established, that even where the testator in one part of his will uses the words "in the event of the death" as meaning "upon the death," this does not prevent the technical construction being placed upon the same words in another part of the will. Thus, if the testator gives property to A for life "and in the event of his death" to B, and gives other property to X absolutely "and in the event of his death" to Y, although in the former gift the words "in the event of his death" must necessarily mean "upon the death of A," yet in the latter gift they will be construed as referring to the death of X in the lifetime of the testator (*z*).

Construction excluded by context.

Where, however, a testator left all his property to his son charged with an annuity to his widow; but should the hand of death fall on my *widow* and son, then over; Lord Cranworth held that the use of the word "widow" showed that the gift over could not have been intended to take effect on an event which was to happen in the testator's own lifetime (*a*).

And where there was a bequest of residue to A and B, and in case of the demise of either to the survivor for life, it was held that A and B took life interests only (*b*).

Where bequest is *future*, the words are extended to the event of legatee dying between death of testator and period of vesting.

II.—Rule where the Gift is future.—Mr. Jarman continues (*c*): "But although in the case of an *immediate* gift it is generally true that a bequest over, in the event of the death of the preceding legatee, refers to that event occurring in the lifetime of the testator, yet this construction is only made *ex necessitate rei*, from the absence of any other period to which the words can be referred, as a testator is not supposed to contemplate the event of himself surviving the objects of his bounty;

(*y*) 1 Y. & C. C. C. 492. See also *Arthur* v. *Hughes*, 4 Bea. 506; *Duhamel* v. *Ardovin*, 2 Ves. sen. 162.

(*z*) *Ingham* v. *Ingham*, Ir. R. 11 Eq. 101, following *Re Mores' Trust*, 10 Ha. 171.

(*a*) *Watson* v. *Watson*, 7 P. D. 10.

(*b*) *Randfield* v. *Randfield*, 2 De G. & J. 57. Compare *Taylor* v. *Stainton*, 2 Jur (N.S.) pp. 634, 635.

(*c*) First ed. Vol. II, p. 664.

and, consequently, where there is another point of time to which such dying may be referred (as obviously is the case where the bequest is to take effect in possession at a period subsequent to the testator's decease), the words in question are considered as extending [*quære whether* confined?] (*d*), to the event of the legatee dying in the interval between the testator's decease and the period of vesting in possession.

"Thus, in *Hervey* v. *M'Laughlin* (*e*), where a testatrix bequeathed two several sums of stock to a trustee, in trust to pay the dividends to T. for life, and after her death she gave the said two sums to G., E., and E., the three children of T., in equal shares, *and in case of the death of either of them*, the share of such as might die to go to and belong to the children, or child if but one, of the persons so dying. G. survived the testatrix, and died in the lifetime of the mother, the legatee for life; and it was contended that the words 'in case of the death' of the legatees referred to a dying in the lifetime of the testatrix, and therefore that the children were not entitled. But the Court considered that the intention of the testatrix was to substitute the children of those dying in the lifetime of the *legatee for life* in the place of their parent, and that therefore the parents took vested interests on the death of the testator, subject to be divested in the event specified.

"In case of the death" referred to period *of possession.*

"On this principle, too, it should seem, that in the case of a bequest to A at the age of twenty-one years, *and in the event of his death* then over to another, the words would be construed to mean, in the event of his dying under twenty-one at any time (*f*).

"And here it may be observed, that those cases in which the word 'or' has been construed as introductory to a substitutional bequest (in which sense it seems to be tantamount to the words 'in case of the death') present a distinction between immediate and future gifts similar to that which has been just pointed out. Thus, a legacy to A or to his children, or to A or his heirs, is construed as letting in the children or next-of-kin ('heirs' being in reference to personal estate construed as synonymous with *next-of-kin*) in the event of A dying in the lifetime of the testator; while, on the other hand, a bequest to A for life, and after his decease to B or his children, is held to create a substitutional gift in favour of the children of B, in the event of B dying in the lifetime of A" (*g*).

"Or" used synonymously with *in case of.*

(*d*) These words and brackets are Mr. Jarman's.

(*e*) 1 Pri. 264. See also *Moone* d. *Fagge* v. *Heaseman*, Willes, 138; *Galland* v. *Leonard*, 1 Sw. 161; *Girdlestone* v. *Doe*, 2 Sim. 225, stated *ante*, p. 1288; *Bolitho* v. *Hillyar*, 34 Bea. 180; *Re Nott's Trusts*, [1875] W. N. 244; *Penny* v. *Commissioner for Railways*, [1900] A. C. 628.

(*f*) See *Home* v. *Pillans*, 2 My. & K. at p. 24, *post*, p. 2107.

(*g*) See cases cited *ante*, p. 1288.

"In case of death" includes death in testator's lifetime.

It will be noticed that in stating the general rule, Mr. Jarman seems to have had some doubt whether words referring to the death of the legatee are confined to the event of death happening in the interval between the testator's decease and the period of vesting in possession, but it is settled that this is not so, and that they apply also to the case of death happening before the testator's decease, which is, indeed, within the literal meaning of the words. Thus, in *Le Jeune* v. *Le Jeune* (*h*), where a testator gave all his estates to his wife for life, and at her death to be sold, if necessary, and divided into five equal shares, one of which he directed to be paid to each of his four sons that should be living at her death; and in case of either of their deaths his share to be paid to his issue, if no issue to be divided among the survivors. One of the sons died before the testator, leaving a child, and Lord Langdale, M.R., held that this child was entitled to the share which its parent would have been entitled to if he had been living at the wife's death.

Construction of words "in case of death" influenced by reason assigned for prior bequest.

In *Green* v. *Barrow* (*i*), a testator gave £1,000 in trust for one for life, and after his decease gave £400, part of it, to A and B (who were two of his executors), "part and part alike, that is to say, £200 to A and £200 to B, for the trouble they may have in execution of this my will; but in case of either of their death, I give to the survivor, and in case of both their deaths to the heirs, executors and administrators of such survivor, £200 only." Sir W. P. Wood, V.-C., thought that, if the will had ended with the gift to the survivor, death in the lifetime of the testator would have been the better construction, on account of the reason expressly given for the bequest being the trouble of executing the will, which the executor would incur immediately upon the testator's death: but the difficulty was on the subsequent words "in case of both their deaths," etc.: the testator must be taken to refer to the same time when he spoke of the death of both as when he spoke of the death of either; and if the words were referred to death in the lifetime of the testator, the effect would be that the testator gave a legacy to the representative of the survivor, though that survivor died in his lifetime; and the reason assigned for the gift altogether failed. He therefore held, though he confessed he did not feel clear upon the point, that on the death of one between the deaths of the testator and the tenant for life, the survivor became entitled to £200.

Gift vested but payment postponed.

The principle above stated applies where payment only, and

(*h*) 2 Kee. 701; *Ive* v. *King*, 16 Bea. 46; *Cambridge* v. *Rous*, 25 Bea. pp. 417, 418; and see analogous cases (*Walker* v. *Main*, etc.), cited *post*, p. 2090; *Hobgen* v. *Neale*, L. R. 11 Eq. 48.

(*i*) 10 Hare, 459.

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not vesting, is postponed to a stated period: as in *James* v. *Baker* (*k*), where the children's "portions" were directed to be paid to them on attaining twenty-one, with a gift over "in case of the death" of any child: it was held that this referred to death under twenty-one whenever happening.

Distinction where prior gift is expressly for life.

III.—Effect where Gift is of a limited interest.—Mr. Jarman continues (*l*): "It should be noticed, that the construction of the words, 'in case of the death,' which makes them provide against the event of the legatee dying in the testator's lifetime, applies only when the prior gift is absolute and unrestricted, and not where such legatee takes a life interest only; for, if a testator bequeaths the interest of a sum of money to A expressly for life, 'and in case of his death' to B, the irresistible inference is, that these words are intended to refer to the event on which the prior life interest will determine, and that the bequest to B is meant to be, not a substituted but an ulterior gift, to take effect on the death of A *whenever that event may happen.*

"Thus, in the case of *Smart* v. *Clark* (*m*), where a testator gave to his son E., who was then at sea, the interest of £500 stock in the five per cents. during his natural life, if he came to claim the same within five years after the testator's decease; but *if he should die*, or not come to claim the same within the time limited, then he gave the said stock to the children of his daughter A, with the interest that might be due thereon. E. claimed within the five years, and received the dividends until his death, when the children of A filed a bill to obtain a transfer; and Sir J. S. Copley, M.R., on the authority of *Billings* v. *Sandom* (*n*), held that they were entitled.

Remark on *Smart* v. *Clark.*

"It is singular that the M.R. did not advert to the circumstance of the prior bequest being expressly for life, which distinguished the case before him from all that had been cited, including *Billings* v. *Sandom*; which case stands upon its special circumstances, and is only to be reconciled with subsequent authorities, on the ground that the context warranted the construing the words 'and in case of her demise' to mean *at* her demise.

Where prior gift comprises the income only.

"Where the prior gift, though not expressly for life, comprises the annual income only of the fund which is the subject of

(*k*) 8 Jur. 750. And see *Monteith* v. *Nicholson*, 2 Kee. 719, *post*, p. 2108. *Re Kerr's Estate*, [1913] 1 Ir. 214 (gift over on death referred to death before period of distribution).

(*l*) First ed. Vol. II, p. 666.

(*m*) 3 Russ. 365.

(*n*) But as to which, *vide ante*, p. 2081.

the bequest, the same construction seems to prevail as where the prior gift is expressly for life (*o*).

Words following devise of estate tail.

"It seems that where a testator devises an estate *tail* to a person, and 'if he die,' then over to another, the words 'without issue' are supplied to render it consistent with that estate" (*p*).

(*o*) *Tilson* v. *Jones*, 1 R. & My. 553. As to the effect of the words following an indefinite devise of land in a will subject to the old law, see *Fortescue* v. *Abbot*, Pollex. 479, T. Jones, 79; *Bowen* v. *Scowcroft*, 2 Y. & C. 640. (Mr. Jarman's statement of these cases is omitted.)

(*p*) *Anon.*, 1 And. 33, *ante*, p. 556.

CHAPTER LVII.

WORDS REFERRING TO DEATH COUPLED WITH A CONTINGENCY.

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Distinction between the cases discussed in the last and in the present chapter.

"THE distinction between the cases, which form the subject of the present inquiry, and those discussed in the last chapter, is," as Mr. Jarman points out (*a*), "obvious. There it was necessary either to do violence to the testator's language, by reading the words providing against the event of death as applying to the occurrence of death at any time, (in which sense death is not a contingent event,) or else to give effect to the words of contingency, by construing them as intended to provide against death within a given period.

"In the cases now to be considered, however, the expositor of the will is placed in no such dilemma; for the testator having himself associated the event of death with a collateral circumstance, full scope may be given to his expressions of contingency without seeking for any restriction in regard to time; and accordingly there seems to be no reason (unless it be found in the context of the will) why the gift over should not take effect in the event of the prior legatee's dying under the circumstances described at *any* period. Cases of this kind, however, will be found to present many distinctions which require particular attention. The cases are divisible into two classes: 1st. Where the question is, whether the substituted gift takes effect in the event of the prior legatee dying under the circumstances described in the testator's lifetime. 2ndly. Where the question

Classification of the cases.

(*a*) First ed. Vol. II, p. 670. The part of this chapter which in previous editions dealt with *Christopherson* v. *Naylor* and other cases of that class have been transferred to Chap. XXXVI on Alternative and Substitutional Gifts, which was new in the last edition.

is, whether the substituted gift takes effect in the event of the prior legatee surviving the testator, and *afterwards* dying under the circumstances described; and if so, whether at *any* time subsequently."

I.—Death of Object of prior Gift in Testator's Lifetime.—(1) *General Rule.*—Mr. Jarman continues (*b*): "It may be stated as a general rule, that where the gift is to a designated individual, with a gift over, in the event of his dying without having attained a certain age, or under any other prescribed circumstances (*c*), and the event happens accordingly in the testator's lifetime, the ulterior gift takes effect immediately on the testator's decease, as a simple absolute gift.

Ulterior gift takes effect on testator's death.

"In the early case of *Darrel* v. *Molesworth* (*d*), where a legacy of £50 was given to D. T. at twenty-one or marriage, and at the close of his will (which contained several pecuniary bequests), the testator added, that *if any legatee died before his legacy was payable*, the same should go to the brothers or sisters of such legatee. D. T. died in the lifetime of the testator (it is presumed under twenty-one (*e*), though the fact is not stated), and it was adjudged that it was no lapsed legacy, but went to the sister of the legatee."

Ulterior legatees held to be entitled.

So, in *Willing* v. *Baine* (*f*), where a testator bequeathed £200 apiece to his children by name, payable at their respective ages of twenty-one, and if any of them died before their age of twenty-one, then the legacy given to the person so dying to go to the surviving children. One of the children died in the testator's lifetime (a minor, it is presumed, though the fact is not stated), and it was held that the children living at the death of the testator were entitled to his legacy.

The construction is the same even where the gift over is of the "legacy" or "share" of the deceased object—terms which might seem in strictness to apply only to persons who, by surviving the testator, had become actual objects of gift, in contradistinction to those who, dying before him, could in point of fact have no "share" or "legacy" under the will.

— though gift over be of the "share" of the deceased.

(*b*) First ed. Vol. II, p. 671.

(*c*) As to a bequest to A, with a gift over in case he dies *intestate*, see *ante*, p. 537.

(*d*) 2 Vern. 378. See also *Ledsome* v. *Hickman*, *ib.* 611; *Bretton* v. *Lethulier*, *ib.* 653; but see *Miller* v. *Warren*, *ib.* 207, n., Raithby's Ed.

(*e*) But see n. (*g*) *infra*.

(*f*) Kel. 12, 2 Eq. Ca. Ab. 545, pl. 22. The report, 3 P. W. 113, omits to state that the children were named. See further *Benn* v. *Dixon*, 16 Sim. 21; *Willetts* v. *Willetts*, 7 Hare, 38; *Ive* v. *King*, 16 Bea. 46; *Re Domvile's Trusts*, 22 L. J. Ch. 947; *Hues* v. *Jackson*, 23 L. J. Ch. 51; *Kellett* v. *Kellett*, Ir. R. 5 Eq. 298.

Walker v. *Main.*

Thus in *Walker* v. *Main* (*g*), where a testator devised real estate to his wife for life, remainder to a trustee in trust for sale, and to pay the produce among his children and grandchildren in manner following : he then gave £20 each to several of his grandchildren *nominatim*, to be paid at twenty-one or marriage; and to his four children, A, B, C and D, all the residue to be divided amongst them equally at the age of twenty-one or marriage; but if any of his children or grandchildren should happen to die before the time of such legacy becoming due and payable, then he bequeathed the part or share of the child or children or grandchildren so dying unto and amongst those that should be then living, share and share alike. B and C died in the testator's lifetime, and it was held that their shares devolved to the survivors.

And in *Varley* v. *Winn* (*h*), where a testator gave to each of his five daughters £6,000, to be invested within seven years after his decease in trust for them or their children : but if any of his said daughters should die leaving no issue, then the share or portion so invested should be divided among those who had issue. One daughter died without issue in the testator's lifetime, and it was held that the legacy bequeathed to her passed under the gift over.

Distinction where gift is to a class.

Mr. Jarman continues (*i*) : " Where, however, the gift is to a class, the objects of which are not, according to the general rules of construction, ascertainable until the decease of the testator (as in the case of a gift to children generally), the application of the words providing against the event of death to children dying in the testator's lifetime becomes rather more questionable, they not being, in event, actual objects of the gift, and therefore not within the clause in question, if that clause is to be construed strictly as a clause of substitution. There are not wanting cases, however, in which, even under such circumstances the words have been held to apply to death in the testator's lifetime,

(*g*) 1 J. & W. 1. It appears that B had attained twenty-one, R. L. 1818, B. 2051. " The time of becoming payable " was therefore held not to arrive until both events had happened, *viz.*, majority (or marriage) and the death of the testator. *Walker* v. *Main* was followed in *Re Gaitskell's Trust*, L. R. 15 Eq. 386. See also *Humphreys* v. *Howes*, 1 R. & My. 639; *Mackinnon* v. *Peach*, 2 Kee. 555; *Rheeder* v. *Ower*, 3 Br. C. C. 240; *Rackham* v. *De la Mare*, 2 D. J. & S. 74; *Ashling* v. *Knowles*, 3 Drew. 593; *Re Green's Estate*, 1 Dr. & Sm. 68. The cases of *Rider* v. *Wager*, 2 P. W. at p. 331; *Bastin* v. *Watts*, 3 Bea. 97, and *Smith* v. *Oliver*, 11 Bea. 494, are contrary to authority.

(*h*) 2 K. & J. 700.

(*i*) First ed. Vol. II, p. 673.

though the language of the will seemed to afford a plausible argument in favour of the contrary construction" (*k*).

Construction where possession is immediate.

If the gift to the class is immediate, and no time is specified for the vesting or for the distribution of it, a gift over in case of death before the legacy is payable is necessarily confined to the case of a child dying in the testator's lifetime. Thus, in *Cort* v. *Winder* (*l*), where a testator bequeathed the residue of his estate in trust for all and every of his first cousins german, share and share alike; and in case any of his said cousins should die before their respective shares should become due or payable, leaving issue him or them surviving, the testator directed that such issue should have the same share or shares as his or their parent or parents would have been entitled to if living (*m*). One of the cousins died before the testator, leaving issue, and it was held by Sir J. K. Bruce, V.-C., that the words due or payable were referable to the time of the testator's death, and that the share intended for the deceased cousin belonged to his issue, "although it had been said to be difficult or apparently difficult to reconcile with that construction the sort of interpretation adopted in *Viner* v. *Francis* (*n*), and other cases of that kind, which attribute this class-description to persons who represent the class at the time of the death."

Direction to settle "share."

Cases in which a testator after a gift to a class directs the settlement of some of the shares present great difficulty, since the word "share" may mean either an aliquot part of the estate or the part actually taken by a member of the class, which, in the event of such member predeceasing the testator, is nothing. Which of these constructions is to prevail will depend upon the wording of the will under consideration; but the fact that it is or

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(*k*) The cases here referred to by Mr. Jarman are *Walker* v. *Main*, and the other cases cited *ante*, p. 2090, in which the "plausible argument in favour of the contrary construction" was based on the reference to the "share" of the deceased object, as already noticed, this does not vary the construction. More recent cases following the principle above stated are *Jones* v. *Frewin*, 12 W. R. 369, 3 N. R. 415; *Re Hotchkiss's Trusts*, L. R. 8 Eq. at p. 649; *Habergham* v. *Ridehalgh*, L. R. 9 Eq. 395. See also *Smith* v. *Smith*, 8 Sim. 353, *ante*, p. 1297; *Re Hayward*, L. R. 19 Ch. D. 470.

It is proper to state that Sir. J. Romilly uniformly expressed an opinion that where the original gift was to a class the gift over did not operate if the deceased object died before the testator, because such object could not himself have taken: *Ive* v. *King*, 16 Bea. at p. 53; *King* v. *Cleaveland*, 26 Bea. at p. 32. He never had occasion, however, to decide accordingly, and it is conceived that the weight of authority and opinion is against him.

(*l*) 1 Coll. 320.

(*m*) No reliance appears to have been placed on the words "would have been entitled to *if living*"; any such reliance being excluded by the word "said" (cousins); as to this see *Loring* v. *Thomas*, 1 Dr. & Sm. 497, *ante*, p. 1310.

(*n*) 2 Cox, 190; *ante*, p. 1639.

appears to be capricious (*o*) of the testator to make (in the most common case) the children of one of his daughters take nothing in the event of such daughter predeceasing him, has led the Court in recent years to be astute in distinguishing those authorities in which the word "share" was held to mean the part actually taken by a member of the class (*p*).

Where gift is expressly to children, etc., living at testator's death.

If the original gift be, not to the class generally, but to such of them only as survive the testator, a contingent gift engrafted thereon in case of the death of any of them can only mean death happening after the death of the testator. Thus, in *Shergold* v. *Boone* (*q*), where a bequest was made to the children of S. who should be living at the time of the testator's decease; and in case any of them should die without leaving issue, his share to go to the survivors or survivor of them; but in case they should leave issue, such issue to be entitled to the share of their deceased parent. Sir W. Grant, M.R., held that the case provided for was the death of any of the children who were the objects of the former bequest, and no children who died before the testator were objects. "The bequest," he said, "is not to all the children generally, but to such only who shall be living at the testator's decease."

Gift over in case of death to executors or administrators, or personal representatives.

(2) *Gift over to Executors, etc., of deceased Legatee.*—Mr. Jarman continues (*r*): "It seems, however, that where the objects of gift in the clause in question are the executors or administrators, or personal representatives of the deceased legatee, such clause is considered as merely showing that the legacy is to be vested immediately on the testator's decease, notwithstanding the subsequent death of the legatee before the period of distribution or payment, and not as indicating an intention to substitute as objects of gift the representatives of those who die in the testator's lifetime.

"Thus, in the case of *Bone* v. *Cook* (*s*), where a testator bequeathed the residue of his estate, at the death of his wife, equally between four persons, and then provided, that in case of the death of any of the legatees before their legacies should become payable, then that the legacy of each so dying should go

(*o*) *Re Whitmore*, [1902] 2 Ch. 66.

(*p*) *Re Whitmore* (*supra*); *Re Powell*, [1900] 2 Ch. 525; *Re Pinhorne*, [1894] 2 Ch. 276, in all of which *Re Roberts*, 30 Ch. D. 234, was distinguished. The earlier case of *Stewart* v. *Jones*, 3 De G. & J. 532, which had been disapproved by Sir R. Malins in *Re Speakman*, 4 Ch. D. 620, was also distinguished in *Re Pinhorne*. See also *Wordsworth* v. *Wood*, 4 My. & Cr. 641, and *Re Lang*, [1912] 2 Ch. 386, cited *post*, p. 2138.

(*q*) 13 Ves. 370. See also *Crook* v. *Whitley*, 7 D. M. & G. 490 (distinct legacies "to each of the present nieces of A").

(*r*) First ed. Vol. II, p. 675.

(*s*) M'Clel. 168, 13 Pri. 332. See *Re Devenish*, [1889] W. N. 204.

to his, her or their children; and *in case of such decease of any of the said legatees without having a child or children*, the legacy of him or her so dying *should go to his or her executors or administrators*, [as part of his, her or their personal estate]. It was held that the share of one of the legatees who died in the testator's lifetime unmarried, lapsed, though it was admitted that, if she had left a child, such child would have been entitled under the previous clause.

Gift to personal representatives not substitutional.

"So, in the case of *Corbyn* v. *French* (*t*), where a testator bequeathed the residue of his estate to his wife for life, and at her decease gave (among other legacies) one to each of the children of E., or their representatives or representative; Sir R. P. Arden, M.R., was of opinion that by the death of one of the children in the testator's lifetime the legacy lapsed, on the ground that a testator must be supposed to contemplate that his legatees will survive him.

"Again, in the case of *Tidwell* v. *Ariel* (*u*), where a testator, after bequeathing several legacies, directed that they should be paid 'in one whole year after his decease, *or to their several and respective heirs*,' Sir J. Leach, [V.-C.], held, that one of the legacies failed by the death of the legatee in the testator's lifetime, the intention being that the legacies should be paid to the representatives if they died within the year.

"It is proper to remind the reader, in connection with the three last cases, that in several instances the words 'representatives' and 'heirs,' when applied to personalty, and even the words 'executors or administrators,' have been held to be synonymous with *next-of-kin* (*x*); but perhaps this does not much weaken the special ground to which these cases have been referred."

Unless the prior gift be immediate.

Where, however, the gift to the primary legatee or his representatives is immediate, without a prior life estate and without postponement of payment, a gift in the alternative to the "heirs" can only refer to the event of death in the testator's lifetime, and is held to import not simply payment to the representatives of the legatee, but substitution of his statutory next-of-kin (*y*).

(*t*) 4 Ves. 418.

(*u*) 3 Mad. 403. And see *Tate* v. *Clarke*, 1 Bea. 100; *Thompson* v. *Whitelock*, 4 De G. & J. 490.

(*x*) *Ante*, pp. 1541, 1586. And see *Re Porter's Trust*, 4 K. & J. 188 (where "heirs" was construed next-of-kin, and *Tidwell* v. *Ariel* was discussed); *King* v. *Cleaveland*, 26 Bea. pp. 26, 166, 4 De G. & J. 477; and Chap. XXXVI, *ante*, p. 1288.

(*y*) *Gittings* v. *M'Dermott*, 2 My. & K. 69. See *ante*, Chap. XXXVI, p. 1287, and Chap. XL, p. 1541.

Gift over of interest of married woman, in case of death, to her next-of-kin.

(3) *Gift over to Next-of-Kin of a Married Woman.*—It has been elsewhere noticed, that if property be given by will to one for life with remainder over, and the tenant for life dies in the lifetime of the testator, the remainder takes effect on his death as an immediate gift. But it was made a question, where the tenant for life was a married woman, and the remainder was limited to her next-of-kin, in the event of her dying in the lifetime of her husband, whether the latter gift was not to be viewed in the same light as a bequest to heirs or executors and administrators; namely, as being intended merely to apply to the event of the legatee dying in the lifetime of her husband, after having survived the testator, and not to prevent lapse in the event of the legatee dying under similar circumstances in the testator's lifetime.

In such a case it now appears to be settled that the gift to the next-of-kin does not lapse (*z*); at any rate where there is not a direct gift to the married woman and a settlement in the way indicated (*a*).

Whether gift over takes effect on happening of event subsequent to death of testator.

II.—Death of Object of prior Gift after the Testator's Death.—(1) *Where there is no previous Interest.*—Mr. Jarman continues (*b*): "We now proceed to examine the second class of cases before referred to, namely, those in which the question has been—whether the substituted gift takes effect in the event of the prior legatee dying *subsequently to the testator's decease*, under the circumstances prescribed; and if so, then, whether at any time subsequently (*c*).

"It is somewhat hazardous, in the state of the authorities, to lay down any general rule on the subject (*d*); but it will commonly be found, it is conceived, that where the context is silent, the words referring to the death of the prior legatee, in connection with some collateral event, apply to the contingency happening as well *after* as before the death of the testator.

"Thus, in the case of *Allen* v. *Farthing* (*e*), where a testator,

(*z*) *Hardwick* v. *Thurston*, 4 Russ. 380; *Edwards* v. *Saloway*, 2 De G. & S. 248, 2 Ph. 625; and see *Nichols* v. *Haviland*, 1 K. & J. 504; and *Kellett* v. *Kellett*, Ir. R. 5 Eq. 298.

(*a*) *Baker* v. *Hanbury*, 3 Russ. 340, might perhaps be supported on this ground, but it is in effect overruled by *Edwards* v. *Saloway* (*supra*). Notice that in all these cases the married woman had a power of appointment and the gift over was in default of appointment.

(*b*) First ed. Vol. II, p. 687.

(*c*) In connection with this question must be borne in mind the provisions of section 134 of the Law of Property Act, 1925.

(*d*) The rule is now well established: see *post*.

(*e*) "M.S., 12th Nov. 1816. This case and the decree thereon are stated 2 Mad. 310 [s. n. *Farthing* v. *Allen*]; but without the arguments and judgment, which are necessary to elucidate the principle of the decision; the author has, however, been favoured with a note of them by a friend." (Note by Mr. Jarman.)

after directing that a sum of £200, recently paid to his daughter, should be deducted from the amount of any moneys, or any share of his personal estate thereinafter bequeathed to her, or to which she should be entitled under and by virtue of that his will, proceeded to devise all his real estate to trustees upon trust for sale, and to apply the moneys to arise therefrom upon the trusts thereinafter declared concerning his personal estate. The testator then bequeathed his personalty to the same persons, upon trust to get in and recover the same, and to pay and divide the same moneys, estate and effects unto and between his son, John Allen, and his daughter, Ann Smith, in equal moieties, share and share alike, the share of the daughter to be for her separate use; *and in case of the death of either of them, the said John Allen and Ann Smith leaving any child or children him or her surviving*, upon trust that the said trustees should stand possessed of the said moiety of the said estate so given to him or her the said J. Allen and A. Smith as aforesaid, in trust for such child or children, as and when they should attain twenty-one, and, in the meantime, to apply the income for maintenance; and in case of the *death of either of them the said John Allen and Ann Smith leaving no issue lawfully begotten*, then upon trust, as to the moiety of him or her so dying, for the survivor of them. The son and daughter having survived the testator claimed absolute interests in the residue, contending that the several gifts in favour of the children and the survivor respectively were intended to provide only for the event of the legatee's dying in the testator's lifetime; and that the terms in which the testator had directed the £200 to be deducted out of his daughter's share aided this construction. Sir J. Leach, V.-C., however, held, that the testator's children took life interests only. He observed, that where a testator refers to death simply, the words are necessarily held to mean death in his (the testator's) lifetime, the language expressing a contingency, and death generally being not a contingent event (though even then slight circumstances would vary the construction); but in the present instance it was not necessary to resort to such a construction, the event described being not death simply, but death *leaving children*, so that there was a clear contingency expressed, and nothing to prevent the words from having full scope. Although the trustees were directed to 'pay' and 'divide' the property between the son and daughter, yet these words were to be taken in connection with the subsequent limitations, which cut down and qualified them: and his Honour thought that the argument founded on the manner in which the advance of £200 was directed to be

The event of death, leaving children, held to apply to period after testator's death.

deducted out of the daughter's share was too weak and inconclusive to control the words.

"So, in the case of *Child* v. *Giblett* (*f*), where a testator bequeathed the residue of his estate to trustees, upon trust, after payment of his debts, to divide the same between his two daughters, A and B, share and share alike, to whom he bequeathed the same; and in case of the death of either, the testator gave the whole to the survivor, *and in the event of their marrying, and having children*, then to the child or children of them, or the survivor of them, if they should attain the age of twenty-one years, but if not, then among the children of C, share and share alike; and if only one child, then the whole thereof to that one child. A and B both survived the testator; and the question was, whether they were entitled to the property absolutely, or for life only. Sir J. Leach, M.R., held that they took life interests only. 'The rule is,' said the learned Judge, 'that where there is a bequest to two persons, and, in case of the death of one of them, to the survivor, the words "in case of the death" are to be restricted to the life of the testator; but the question is, whether the first expression used by this testator, to which this rule would apply, is not qualified by the subsequent words of the will. The testator cannot possibly have intended that the children of C should take, in the event of a marriage of his daughters, and their death without children in his lifetime, and that they should not take in the event of a marriage of his daughters, and their dying without children after his decease. That would not be a rational distinction. I am of opinion, therefore, that the general rule is here qualified by the subsequent words used by the testator, and that in the event of A dying without children, or if she should have children, and none of them live to attain the age of twenty-one, the children of C will be entitled to the residuary property of the testator.'"

Gift over, on A marrying and having children, extended to event *after* death of testator.

And in *Smith* v. *Stewart* (*g*), where a testator devised and bequeathed the residue of his real and personal estate in different shares amongst several persons, and directed that the whole of the said legatees should have the benefit of survivorship between them in the event of any one or more of them dying without leaving issue: the question was, whether the legatees acquired an

(*f*) 3 My. & K. 71.

(*g*) 4 De G. & S. 253. See also *Gawler* v. *Cadby*, Jac. 346; *Gosling* v. *Townshend*, 17 Bea. 245, affirmed on distinct grounds, 2 W. R. 23; *Varley* v. *Winn*, 2 K. & J. 700; *Cotton* v. *Cotton*, 23 L. J. Ch. 489; *Johnston* v. *Antrobus*, 21 Bea. 556 (as to the pecuniary legacy); *Randfield* v. *Randfield*, 8 H. L. C. pp. 225, 236 (real estate); *Bowers* v. *Bowers*, L. R. 5 Ch. 244; *Woodroffe* v. *Woodroffe*, [1894] 1 Ir. 299; *Duffill* v. *Duffill*, [1903] A. C. 491; *Re Richardson's Trusts*, [1896] 1 Ir. 295 ("dying leaving their children fatherless").

indefeasible interest by surviving the testator; and Sir J. K. Bruce, V.-C., decided that they did not.

Gifts over, comprising every possible event, confined to testator's lifetime.

Mr. Jarman continues (*h*): "Sometimes, however, it happens, that a devise in fee simple is followed by alternative limitations over, which collectively provide for the event of the death of the devisee, under all possible circumstances. In such a case, we are, it is said, compelled to read the words of contingency as applying exclusively to the happening of the event in the testator's lifetime, in order to avoid repugnancy, inasmuch as the alternative limitations, if not so qualified and restricted in construction, would reduce the prior devise in fee to an estate for life. This argument seems to have prevailed in *Clayton* v. *Lowe* (*i*), where a testator gave his residuary real and personal estate to be equally divided between his three grandchildren, A, B, and C, share and share alike, *for ever; and if either of them should happen to die without child or children lawfully begotten*, then he directed that such part or share of the one so dying should be equally divided amongst the surviving brothers or sister; *but if any of his grandchildren should die and leave child or children lawfully begotten*, that such child or children should have their parent's share equally divided amongst them, share and share alike. All the grandchildren survived the testator, and it was held, by the Court of King's Bench, on a case from Chancery, that in the events which had happened, they took estates in fee simple as tenants in common.

Clayton v. *Lowe.*

Remarks on *Clayton* v. *Lowe.*

"The reasons for the conclusion at which the Court arrived do not appear, but we may presume them to be in consistency with the argument (already noticed) which was strongly urged by the very able counsel for the plaintiffs, namely, that the several alternative limitations would, unless confined to the happening of the event in the testator's lifetime, operate to cut down the fee previously devised to an estate for life; but the reasoning, when closely examined, is not so conclusive as at first sight it may appear. Why, it may be asked, may not a testator intend that the estate of his devisee, though determinable at all events on his decease, should comprise the inheritance in the meantime, which is certainly something different from an estate for life (*k*). Besides, the devise over, in *Clayton* v. *Lowe*, of the shares of grandchildren who should die without children, in favour of the surviving grandchildren, would not apply to, and would therefore leave the fee in, the last survivor, who

(*h*) First ed. Vol. II, p. 690.
(*i*) 5 B. & Ald. 636.
(*k*) "For instance, dower and curtesy would attach to the one, not to the other." (Note by Mr. Jarman.)

might die without children; and this, even, independently of the more general ground first suggested, makes a solid difference between such a devise and a mere estate for life (*l*). Whether the certificate of the Court of King's Bench was confirmed by the Vice-Chancellor does not appear. Under such circumstances it would be unsafe to rely on the case as a deliberate adjudication in support of so doubtful a principle" (*m*).

In *Gee* v. *Town Council of Manchester* (*n*), the testator gave his freehold, leasehold and personal property among his children in manner following: he gave to his son A one-seventh share of his property, "to his heirs, executors and administrators," and he gave one-seventh share to each of his other six children in similar terms; and provided, "in case any of my sons and daughters die without issue, that their share returns to my sons and daughters, equally amongst them; and in case any of my sons and daughters die and leaving issue, that they take their deceased parent's share, share and share alike." Knight-Bruce, V.-C., said: "Am I warranted, under these circumstances, in introducing the words 'in my lifetime' in the latter part of the will? I think that I am not." The observations of Mr. Jarman on *Clayton* v. *Lowe* (*o*) were cited, and the V.-C. reiterated his opinion, but expressed the wish that the case should be taken to a Court of law. This was done, and the Court of Queen's Bench, approving the decision in *Clayton* v. *Lowe*, held that each child who survived the testator took an indefeasible estate in fee in the real estate and an absolute interest in the leaseholds (*p*).

The decision seems to have rested on the ground that where property is given to A, with a gift over on his death, with or without issue, this is the same thing as if the gift over were on his death simply (*q*); in such a case, said the Court, by no possibility can A take an absolute interest, and therefore the gift cannot be treated as a gift subject to an executory gift over. On the other hand, if the double gift over were given effect to by cutting down A's interest to a life estate, this would, said the Court, involve the rejection of the words "heirs, executors and administrators" in the original gift. The only way, they thought, of giving effect to all the words of the will was to hold

(*l*) See the same reasoning advanced by Lord Hatherley in *Bowers* v. *Bowers*, L. R. 5 Ch. at p. 250.

(*m*) See, however, Sargant J.'s observations in *Re Brailsford*, [1916] 2 Ch. 536.

(*n*) 19 L. J. Ch. 151. The will was before the Wills Act.

(*o*) 5 B. & Ald. 636, p. 2097.

(*p*) *Gee* v. *Mayor, etc. of Manchester*, 17 Q. B. 737.

(*q*) See *per* Lord Cairns in *O'Mahoney* v. *Burdett*, L. R. 7 H. L. at p. 397.

that the double gift over was intended solely to provide for the case of lapse.

The principle of the decision was disapproved by Lord Cranworth, in *Gosling* v. *Townshend* (*r*), and by Lord Hatherley, in *Bowers* v. *Bowers*, where the L.-C. pointed out the absurdity of supposing "that where the testator mentions all the contingencies, so that the first taker must die under some one or other of the circumstances mentioned, you are to add them together so as to make a certainty—then treat the case as if the gift over were simply 'in case he shall happen to die,' and restrict the happening of that event to the testator's lifetime, in order to satisfy the words importing contingency" (*s*). But it was followed by Stuart, V.-C. (*t*), and also by Sargant, J., in *Re Brailsford* (*u*), where, after the death of the widow, real estate was devised to the testator's son, his heirs and assigns, with a double gift over in case he should die, either without leaving, or leaving, issue. The son survived the widow; and it was held that he took an indefeasible estate in fee-simple.

It is somewhat singular that the Judges who decided *Clayton* v. *Lowe* and *Gee* v. *Mayor, etc., of Manchester* do not seem to have noticed that in *Allen* v. *Farthing* (*x*), which is always treated as an unquestioned authority (*y*), there was a gift over in the alternative event of the testator's children dying with or without leaving children, and the M.R. held that they took life interests only.

Distinction where words of gifts are emphatic.

There is, however, a distinction between cases in which the primary gift is a simple gift, and those in which words are added showing a clear intention to give the devisee or legatee a complete power of enjoyment and disposition. Thus, in *Cooper* v. *Cooper* (*z*), a testator bequeathed the residue of his personal estate equally between his four children (naming them), and in case of the death of either of them leaving issue, then the issue of such child to take the parent's share; but in the event of their dying without leaving issue, then the share of the one so dying to become part of the residue of his personal estate. On the ground that there were no words in the primary bequest expressly giving an absolute interest (as there were in *Clayton* v. *Lowe*

(*r*) 2 W. R. 23.
(*s*) L. R. 5 Ch. at p. 248.
(*t*) *Woodburne* v. *Woodburne*, 23 L. J. Ch. 336.
(*u*) [1916] 2 Ch. 536. See Sargant, J.'s observations on *Clayton* v. *Lowe*. He approved Mr. Hawkins' view (Hawkins on Wills, 1st ed., p. 259, 3rd ed., p. 308), and considered that the criticisms on *Clayton* v. *Lowe* were ill-founded. *Re Brailsford* was approved in *Christian* v. *Taylor*, [1926] A. C. 773.
(*x*) *Ante*, p. 2095.
(*y*) See *per* Lord Cairns, in *O'Mahoney* v. *Burdett*, L. R. 7 H. L. at p. 395.
(*z*) 1 K. & J. 658.

and *Gee* v. *Mayor of Manchester*) and that there was therefore no danger of imputing two inconsistent intentions to the testator in refusing to hold the bequest absolute upon the testator's death, it was held by Sir W. P. Wood, V.-C., that the children took life interests only.

The same principle was followed in *Bowers* v. *Bowers* (*a*).

What words in a gift over, in the alternative event of death with or without leaving issue, are sufficient to prevent it from cutting down the primary gift to a life interest, is not satisfactorily settled. *Da Costa* v. *Keir* (*b*) was a clear case of this kind (*c*). Whether words which are often added as common form, and are therefore mere surplusage—such as words of limitation, or the words "for ever," or the like—can have this effect, is more doubtful (*d*). On principle there seems to be no distinction between a devise of land "to A" and a devise to "A and his heirs," or between a bequest of personalty "to A" and a bequest to "A, his executors, administrators and assigns."

Distinction where prior gift may be regarded as a mere life interest.

After stating and commenting on the decision in *Clayton* v. *Lowe* (*e*), Mr. Jarman continues (*f*): "At all events, where the gift, which precedes the alternative gifts over, is not (as in the last case) absolute and unqualified, but is so framed as to admit of its being, without inconsistency or violence, restricted to a life interest, the ground for the construction adopted in these cases failing, the gift in question is held to confer a life interest only, there being no reason why the fullest scope should not be given to the several alternative gifts over.

"As where (*g*) a testatrix bequeathed to A the sum of £400, to be vested in the public funds, the interest whereof she should receive when she should attain twenty-one. *In the event of her decease at, before, or after the said period*, the sum so bequeathed to be divided between B and C. Lord Langdale, M.R., said that the words 'at, before, or after,' involved

(*a*) L. R. 5 Ch. 244; *Gosling* v. *Townsend*, 2 W. R. 23. The cases of *Rogers* v. *Waterhouse*, 4 Drew. 329, and *Rogers* v. *Rogers*, 7 W. R. 541, cannot be relied on *contra*.

(*b*) 3 Russ. 360, stated *post*, p. 2104.

(*c*) See *Cooper* v. *Cooper*, 1 K. & J. 658; *O'Mahoney* v. *Burdett*, L. R. 7 H. L. at p. 396.

(*d*) In *Cooper* v. *Cooper*, *supra*, Wood, V.-C., justified the decision in *Clayton* v. *Lowe* on the ground that the primary gift contained the words "for ever," while in *Bowers* v *Bowers* he expressed strong disapproval of the decision. In *Apsey* v. *Apsey*, 36 L. T. 941, Malins, V.-C., decided that the devisees took absolute interests, on the ground that the devise was to them and their heirs for ever. *Woodburne* v. *Woodburne*, 23 L. J. Ch. 336, seems also referable to this ground.

(*e*) *Ante*, p. 2097.

(*f*) First ed. Vol. II, p. 692.

(*g*) *Miles* v. *Clark*, 1 Kee. 92; see *Tilson* v. *Jones*, 1 R. & My. 553, *ante*, p. 2087.

all time present, past, and future, and that the only construction to be put on these words therefore was, 'in the event of her decease, whenever that event might happen.'"

It was scarcely possible, indeed, to put any other construction on this will. The reference was expressly to the age of twenty-one years; and therefore no room was left to imply a reference to any other or additional period, as the death of the testator.

The event restricted to the testator's death by the context.

The general rule which permits the gift over to take effect upon the happening of the contingency at any time after the testator's death, is of course excluded by any context which shows that the testator did not intend it so to operate. Thus, in *Re Anstice* (*h*), where a testatrix gave the residue of her personal estate to trustees in trust to pay and divide the same in equal shares between her two cousins A and B; and "in case either of them should be married at the time of her said legacy becoming payable, then the same shall be paid or disposed of for her separate use, and her receipt alone for the same shall be a sufficient discharge"; and in case either of them should die without leaving issue, then her share to go to her sister; and in case both should die without leaving issue, then over; it was held by Romilly, M.R., that this meant death in the testatrix's lifetime, for the legatees (if married) were to be competent to give a full discharge for their legacies when they became payable, which was inconsistent with a gift over upon an event to happen at any time during their lives.

The event restricted by the context.

So where the gift was to several as tenants in common, and in case any of them should die without leaving issue, the shares of them so dying were to go to the others and to the issue of such of them as should die leaving issue in equal shares, such issue to take the shares which their respective parents would have taken *if living*; it was clear that the interest of the original legatees was not to be defeasible during their whole lives (*i*). And the circumstance that one of several alternative gifts over is expressly confined to death without issue under twenty-one, is a strong argument that the other, though in terms indefinite, was intended to be so confined too (*k*).

(*h*) 23 Bea. 135.

(*i*) *Johnston* v. *Antrobus*, 21 Bea. 556 (the share of residue). There was also a gift over on death leaving issue; but the decision was based on the clause in the text. See also *Re Hayward*, 19 Ch. D. 470, where the clause was similar but without the words "if living." See also *Cross* v. *Coltart*, [1884] W. N. 123.

(*k*) *Brotherton* v. *Bury*, 18 Bea. 65. Other cases are *Clark* v. *Henry*, L. R. 11 Eq. 222, 6 Ch. 588; *Lloyd* v. *Davies*, 15 C. B. 76 (devise to three in common, with gift over on marriage of one to the other two, they paying her £500 within one year from testator's death); *Vulliamy* v. *Huskisson*, 3 Y. & C. 80 (direction to settle legacy in case of marriage): *Money* v. *Money*, 44 L. T. 639, *ante*, p. 1376, n. (*e*).

CHAPTER LVII.

"Pay" or "divide."

It has been held (*l*) that if the primary gift is in the form of a direction to "pay" or "divide" a fund to or among the legatees, this shows an intention that their shares are to vest absolutely at the death of the testator, and thus to exclude the rule in *Farthing* v. *Allen*. But the better opinion is that such words are not sufficient, by themselves, to have this effect (*m*). On the other hand, a direction that the shares are "to be paid, transferred and assigned" to the legatees "as soon as conveniently may be after my decease," would probably be sufficient without more, to show that they were intended to vest absolutely on the testator's death (*n*).

Where prior life interest.

(2) *Where there is a prior Life or other Interest.*—Mr. Jarman continues (*o*): "In all the preceding cases it will be observed, that the gift to the person on whose death, under the circumstances described, the substituted gift was to arise, was immediate, *i.e.* to take effect in possession, so that the Court was placed in the alternative of construing the words either as applying exclusively to death in the lifetime of the testator, or as extending to death at any time, the will supplying no other period to which the words could be referred: but where the two concurrent or alternative gifts are preceded by a life or other partial interest, or the enjoyment under them is otherwise postponed, the way is open to a third construction, namely, that of applying the words in question to the event of death occurring before the period of possession or distribution. In such case, the original legatee, surviving that period, becomes absolutely entitled."

At one time it was supposed that there was a general rule to the effect that "where there is an absolute gift to vest in possession at a future time, and a gift over in case the legatee should die without issue living at his decease, this *prima facie* is to be taken to mean if he should die without issue before he is entitled to call for delivery, as it would be very inconvenient that, after delivery, the subject of gift should be liable to go over" (*p*). This rule was known as the fourth rule in *Edwards* v. *Edwards* (*q*), but it has now been authoritatively settled by the House of Lords in the two cases of *O'Mahoney* v. *Burdett* (*r*)

(*l*) *Re Smaling*, 26 W. R. 231.

(*m*) See *per* Leach, M.R., in *Farthing* v. *Allen*, *ante*, p. 2095: *per* Lord Cranworth, in *Gosling* v. *Townshend*, 2 W. R. 23; *per* Lord Hatherley, in *Bowers* v. *Bowers*, L. R. 5 Ch. 244; and see *Duffill* v. *Duffill*, [1903] A. C. 491.

(*n*) *Ware* v. *Watson*, 7 D. M. & G. 248.

(*o*) First ed. Vol. II, p. 693.

(*p*) See *Re Heathcote's Trusts*, L. R. 9 Ch. 45 at p. 51.

(*q*) 15 Bea. 357.

(*r*) L. R. 7 H. L. 388.

and *Ingram* v. *Soutten* (*s*), that where the original gift is deferred, as well as where it is immediate, the substituted gift will *prima facie* take effect whenever the death under the circumstances described occur. An illustration is afforded by the case of *Re Schnadhorst* (*t*), where the testator gave his residuary estate upon trust for his widow for life or widowhood, and after her decease or second marriage to apply the income for the maintenance and education of his children until the youngest who should be living being a son should attain twenty-one, or being a daughter should attain that age or marry; subject thereto he directed that the trust fund and the income thereof, and any accumulations not vested or applied under his will, should be held in trust for all his children who being sons should attain twenty-one, or being daughters should attain that age or marry, to whom he gave his residuary estate in equal shares; and he directed that if any of his children should die leaving issue, such issue should take his or her deceased parent's share equally, as tenants in common. The Court of Appeal held that the children who survived the testator only took vested indefeasible interests if and when they should die—that is, die at any time—without leaving issue.

Re Schnadhorst.

The cases in the footnote were decided before *O'Mahoney* v. *Burdett* on the supposed general rule in *Edwards* v. *Edwards*. Most, if not all, of them might perhaps be supported on special grounds; and it may be observed that none of them were bare cases of successive trusts like the two cases in D. P. (*u*). Further, *Edwards* v. *Edwards* (*x*) itself, though the decision was based upon the supposed general rule, may be justified on special grounds, as was pointed out by Lord Selborne, Lord Hatherley and Lord Cairns in *O'Mahoney* v. *Burdett* (*y*).

Contingency restricted by context.

The rule being as thus laid down in the House of Lords, it is to be considered what species of context will exclude it, and confine the operation of the gift over to death occurring before the period of possession. An example of such a context is

(*s*) L. R. 7 H. L. 408, reversing *Re Heathcote's Trusts*, L. R. 9 Ch. 45, and restoring decision of Malins, V.-C., *ib.* p. 47, n. See also *Benn* v. *Dixon*, 16 Sim. 21.

(*t*) [1902] 2 Ch. 234. See also *Re Bathe*, [1925] 1 Ch. 377.

(*u*) *Dean* v. *Handley*, 2 H. & M. 635. See *O'Mahoney* v. *Burdett*, L. R. 7 H. L., at p. 403; *Re Allen's Estate*, 3 Drew. 380; *Johnson* v. *Cope*, 17 Bea. 561; *Beckton* v. *Barton*, 27 Bea. 99; *Slaney* v. *Slaney*, 33 Bea. 631; *Re Hill's Trusts*, L. R. 12 Eq. 302. On special grounds the contingency was held in *Milner* v. *Milner*, 34 Bea. 276 (settlement), and *Witham* v. *Witham*, 3 D. F. & J. 758 (direction to settle shares of daughters if they should marry) not to be confined to the life of the tenant for life; and in *Smith* v. *Colman*, 25 Bea. 216 (similar direction to settle), to be confined to the death of the testator.

(*x*) 15 Bea. 357.

(*y*) L. R. 7 H. L. at pp. 391, 400, 405.

CHAPTER LVII.

Da Costa v. *Keir.*

afforded by *Da Costa* v. *Keir* (*z*), where a testator gave the residue of his estate to trustees, upon trust to pay the interest to his wife for life, and after her decease, he gave the principal to A for her own use and benefit to be at her own disposal; but if the said A should die leaving any child or children living at her decease, then he gave the residue to her children; but if she should die without any child living at her decease, then he gave the same to B and C equally; but if either of them should die before they should become entitled to receive the said residue, then he gave the whole to the survivor; and if both should die in the lifetime of his wife, then he gave the said residue to his wife. A survived the testator and his widow, and was held to be entitled absolutely.

So, in *Barker* v. *Cocks* (*a*), where a testator bequeathed a fund after the decease of his wife (who had a life interest therein) to A, B and C, equally to be divided between them, share and share alike; but in case of the death of C without leaving lawful issue, he gave her third part to A and B equally; it was held by Lord Langdale, M.R., that, having survived the wife, C had acquired an absolute interest.

Contingency restricted to period of distribution.

A question of this nature arose in *Galland* v. *Leonard* (*b*), where a testator gave the residue of his personal estate to trustees, upon trust to place the same out at interest during the life of his wife, and pay her a certain annuity, and upon her death to pay and divide the said trust moneys unto and equally between his two daughters, H. and A.; and in case of the death of them his said daughters, or either of them, leaving a child or children living, upon trust for the children in manner therein mentioned; and the testator declared that the children of each of his daughters should be entitled to the same share his, her or their mother would be entitled to if then living; and in case of the death of his said two daughters without leaving issue living, then over. Sir T. Plumer, M.R., held that the testator intended only to substitute the children for the mother, in the event of the decease of the latter during the widow's life, and that the daughters who survived her (the widow) became absolutely entitled. "In this case," as Mr. Jarman remarks (*c*), "the frame and terms of the bequest showed that the testator contemplated the death of the widow as the period of distribution, and any doubt which his previous expressions may have left on

Remark on *Galland* v. *Leonard.*

(*z*) 3 Russ. 360. *Re Hayes*, 9 Jur. (N.S.) 1068. So if one of several alternative gifts over be expressly confined to a definite period, it is an argument for confining the others also; *Wood* v. *Wood*, 35 Bea. 587. And see *Whiting* v. *Force*, 2 Bea. 571; *King* v. *Cullen*, 2 De G. & S. 252.

(*a*) 6 Bea. 82.

(*b*) 1 Sw. 161.

(*c*) First ed. Vol. II, p. 694.

this point is dispelled by the clause entitling the children to the shares which their parents, *if living*, would have taken."

Contingency restricted to period of distribution by express direction to distribute.

"It is manifest," said Lord Selborne (*d*), "that when a testator (as in *Galland* v. *Leonard*) has directed payment or distribution to be made at a certain time, so that a trust, intended by him to continue until that time, shall then come to an end, and has proceeded to substitute other devisees or legatees through the medium of the same trustees and the same trust, in case of the death, without leaving issue, of any of the persons to whom such payment or distribution was first directed to be made; there is strong *prima facie* reason for holding that the contingency must be intended to happen, if at all, before the period of distribution. And a rule so limited (subject of course to exceptions resulting from any particular words indicative of a contrary intention) would seem to be in harmony with sound principle and with the general current of authority" (*e*).

Olivant v. *Wright*.

A question of the same kind afterwards arose in *Olivant* v. *Wright* (*f*), where a testatrix having separate real and personal estate gave it to her husband for life; "and after his decease to be divided amongst my five children, share and share alike; and if any of my children should die without issue, then that child or children's share shall be divided, share and share alike, among the children then living; but if any of my children should die leaving issue, then that child (if only one) shall take its parent's share, and if more than one, to be divided equally amongst them, share and share alike." It was held by Sir J. Bacon, V.-C., that the case was within the rule laid down in D.P.; that the share of a child who survived the tenant for life leaving issue passed to the issue; and that the share of another child who afterwards died without issue passed to the three children then surviving. On appeal this was reversed, on the ground that the testatrix clearly intended an actual and final division to be made at the death of the tenant for life. Sir W. James observed that all was consistent with that intention, and that any other construction would lead to so many absurdities and contradictions that he could not bring himself to entertain a doubt. He said the natural meaning of "then" would be the time of division which had before been spoken of as to be made at the death of the tenant for life. Sir G. Mellish said that, according to the respondent, there might be several periods of division, and what was to happen if all the five children one after the other died

(*d*) In *O'Mahoney* v. *Burdett*, L. R. 7 H. L., at p. 406. An express direction is here meant, not merely such a disposition of the property as involves distribution, *ib*. 407. See also *Ward* v. *Brown*, [1916] 2 A. C. 121; *Re Mackinlay*, 56 Sol. J. 142.

(*e*) This principle was followed in *Hordern* v. *Hordern*, [1909] A. C. 210.

(*f*) L. R. 20 Eq. 220; 1 Ch. D. 346; *Re Thompson to Curzon*, 52 L. T. 498.

without issue did not exactly appear. Sir G. Bramwell observed that, according to the respondent, the surviving children took the shares of the child dying without issue to the exclusion of the issue of the child who died with issue, which certainly was unreasonable; and further that a grandchild dying during the life of the tenant for life would take that which a child dying during the life of the tenant for life would not take, which also seemed unreasonable.

Contingency restricted to avoid inconsistency in gift over.

The difficulties here suggested do not appear to be very formidable (*g*). That they were considered to be so in *Olivant* v. *Wright* may probably be taken as evidence that an express direction to distribute needs little assistance from the context to exclude the general rule which reads death without issue as meaning death at any time. If, indeed, absurdity or contradiction is really produced in the ulterior trusts by so reading the will, but is avoided by confining the contingency to the limited period, there is strong ground for adopting the latter construction, even although the will contains no express direction to distribute, and no trust (*h*).

Contingency restricted by express direction to convey.

The effect of an express direction to convey at a particular time is further shown by *Wheable* v. *Withers* (*i*), where a testator gave real and personal estate to trustees, in trust for his wife for life, and after her death *to convey and assure, pay and divide* the same unto and amongst all his children in equal shares *on their respectively attaining twenty-one*; and in case of the death of any of them without issue under that age, or before acquiring a vested interest (*k*), then to *convey*, etc., his part to the survivors; but in case any of the testator's children *should die at any time either before or after him* having issue, then *to convey*, etc., his part to such issue. All the children having attained twenty-one, it was held by Sir L. Shadwell, V.-C., that they had become indefeasibly entitled. He thought the words "under twenty-one" must of necessity be implied in the gift over to issue, since the trustees having under the first trust executed an absolute conveyance to the children at twenty-one would have nothing left in them to enable them to execute the last trust as it stood in the will.

(*g*) See *ante*, and Lord Hatherley's judgment; *Bowers* v. *Bowers*, L. R. 5 Ch., at p. 250; also *ante*, p. 1300 *seq.*

(*h*) See *Besant* v. *Cox*, 6 Ch. D. 604. But the report does not make it clear how in this particular case the words "that shall leave such lawful issue" which caused the difficulty upon one construction were made intelligible by adopting the other; *Re Roberts*, [1916] 2 Ch. 42; *Christian* v. *Taylor*, [1926] A. C. 773.

(*i*) 16 Sim. 505. See also *Whiting* v. *Force*, 2 Bea. 571; *Glyn* v. *Glyn*, 26 L. J. Ch. 409 (distribution directed at twenty-five, with gift over of the share of the eldest if he came into settled estates); *Re Luddy*, 25 Ch. D. 394; *Lewin* v. *Killey*, 13 A. C. (P. C.) 783.

(*k*) These last words were held to be merely tautologous.

Contingency restricted to minority of legatees rather than to lifetime of tenant for life.

In the last case, it appears that the wife was dead, but not when she died; nor was it suggested that the time of her death furnished a limit to the contingency. That it is not the time of eventual distribution, but the time pointed out by the express direction to distribute, that fixes that limit, is more distinctly shown by *Re Johnson's Trusts* (*l*), where a testator devised real estate to his wife for life, remainder to trustees in trust to sell, to invest the proceeds, and to apply the income in bringing up his nephews and nieces, the children of his sister S., during their respective minorities; and upon further trust to pay his nephews and nieces their respective shares when and as they should respectively attain twenty-one; if any of them should die without leaving issue, their shares to be paid to the survivors when their original shares were payable as aforesaid; if any of them should be of age at the time of sale, their shares to be paid immediately after the sale. All the nephews and nieces but two died before the wife, some under age, others after attaining twenty-one, and some leaving issue, others not. It was held by Sir W. P. Wood, V.-C., that a nephew or niece became indefeasibly entitled on attaining twenty-one. He observed that the Court always leaned towards the construction which vested a provision for children at the time when it was most likely to be required. He thought the testator had plainly expressed his intention that the original shares should vest at twenty-one, and that the period of survivorship as to the accruing shares was to be the period of the vesting of original shares.

Contingency restricted to period of vesting.

The restricted construction prevailed, partly on the authority of *Galland* v. *Leonard*, in what Mr. Jarman describes (*m*) as "the more doubtful case of *Home* v. *Pillans* (*n*), where a testator bequeathed to his nieces, C. and M., the sum of £2,000 each, when and if they should attain their ages of twenty-one years; and which said legacies he gave to them for their sole and separate use, free from the debts or control of their, or either of their husbands; *and in case of the death of his said nieces, or either of them, leaving children, or a child*, the testator bequeathed the share or shares of each of his said nieces so dying, unto their or her respective children or child. Sir J. Leach, M.R., held that the nieces did not take absolute interests at majority; but that the bequest to them continued to be liable to the executory gift, on their dying, leaving children. Lord Brougham, C., reversed the decree, on the ground that the construction adopted by the Court below was irreconcileable with the authorities, especially those cases in which words

(*l*) 10 L. T. (N.S.) 455. See also *Re Hayne's Trust*, 18 L. T. 16.
(*m*) First ed. Vol. II, p. 695.
(*n*) 2 My. & K. 15.

referring to death generally, had been held to be restricted to death occurring in the lifetime of the prior legatee for life (*o*), and he adduced *Galland* v. *Leonard* as an authority precisely in point. His lordship also dwelt on the inconvenience of holding the absolute vesting to be suspended during the life of the legatee, which was a construction the Court could never adopt but from necessity; and he considered that, in the present instance, such a construction would have the effect of defeating the testator's intention, which evidently was, that at the age of twenty-one the legacies should become absolutely vested.

Remark on Lord Brougham's judgment in *Home* v. *Pillans*.

"It is observable that Lord Brougham, in his remarks on *Hervey* v. *M'Laughlin* (*p*) and that class of cases, but very faintly adverts to the fact, that, in them, the gift over was in case of death simpliciter, and in the will before him it was in case of death *in connexion with a collateral event* (i.e. leaving children), which forms a most material distinction, and excludes from the latter case much of the reasoning adopted by his Lordship from the cited authorities. The point which he had to decide was certainly one of great difficulty."

Home v. *Pillans*, approved by Lord Kingsdown.

But the decision in *Home* v. *Pillans* has frequently been recognised as correct. Thus in *Randfield* v. *Randfield* (*q*), where a testator devised real estate to his son when he attained twenty-one, with a gift over if he should die leaving no issue, but where under the circumstances the words "when he attained twenty-one" were taken *pro non scriptis*, Lord Kingsdown said that he thought the rule laid down in *Home* v. *Pillans* was a perfectly sound one, and that it ought not to be disturbed, though it could not apply there. "If," he added with reference to the case before him, "there had been two contingencies to which the words might have been applicable they would I think have been properly applicable to the first, the dying under twenty-one; but that contingency did not exist when the will was executed, and they can be applicable therefore only to the other." As was said in the argument of that case, it is highly improbable that the testator could mean to give the estate absolutely to his son upon his attaining twenty-one, and then take it away again after the son had attained that age.

Contingency restricted to period of vesting.

Again, in *Monteith* v. *Nicholson* (*r*), where a testator gave his personal estate to his brothers and sisters living at his decease, their executors administrators and assigns, as tenants in common,

(*o*) *Vide ante*, p. 2083.
(*p*) 1 Pri. 264.
(*q*) 8 H. L. C. pp. 225, 231, 240. See and consider the explanation of this case given by Lord Cairns in *O'Mahoney* v. *Burdett*, L. R. 7 H. L., at p. 397, and the remarks of Stirling, L.J., in *Re Schnadhorst*, [1902] 2 Ch. 234.
(*r*) 2 Kee. 719. See also *Re Dowling's Trusts*, L. R. 14 Eq. 463.

and declared that if any of them should die in his lifetime or afterwards without leaving lawful issue, the share or shares of him, her or them should go to and be equally divided amongst the survivor or survivors of them; and if any of them should die in his lifetime or afterwards leaving issue, the share or shares of him her or them so dying should go to and be equally divided amongst such issue, such child or children taking their parent's share. "And, moreover, I declare it to be my will, that none of the legatees under this my will shall be entitled to any bequest until they severally attain the age of twenty-one years." It was held by Lord Langdale, M.R., that each of the brothers and sisters took an absolute vested interest on attaining the age of twenty-one years.

On the same principle, if the gift after a life estate is contingent on the legatee surviving the tenant for life, a gift over if he dies without leaving issue will, it seems, be restricted to death in the lifetime of the tenant for life (*s*).

In *McCormick* v. *Simpson* (*t*) a testator gave his property to his wife for life and after her death to "become the property of" his son John to be held by him for the term of his life, and at the death of John to "become the absolute property of his eldest son, failing such son then the same to be and become the property of my son James or of his eldest son, and in case of the death of James without such male issue as aforesaid," then over; John died in the testator's lifetime without male issue; James and his son survived the widow; the son died before his father, and James died without leaving a son; it was held that on the death of the widow James took an absolute interest, and that this was not divested by his subsequent death without leaving male issue.

The restricted construction may however be excluded if, besides the gift over in question, there is another gift over of the same legacy expressly in case of death before the time of vesting (*u*). Nor has it been generally extended to cases of immediate gift, vested in point of interest, but where possession is directed to be given or payment made at a specified time (*x*).

Jones v. *Morris*.

In *Jones* v. *Morris* (*y*), the testator gave his estate to his wife during her life, if she should so long continue his widow,

(*s*) *Andrews* v. *Lord*, 6 Jur. (N.S.) 865. See also *Re Sarjeant*, 11 W. R. 203; and judgment in *Garey* v. *Whittingham*, 5 Bea., at p. 270. These cases are not strong authorities in favour of the principle, but it seems correct.

(*t*) [1907] A. C. 494.

(*u*) *Martineau* v. *Rogers*, 8 D. M. & G. 328.

(*x*) *Smith* v. *Spencer*, 6 D. M. & G. 631, explained 2 H. & M., at p. 639; *Cotton* v. *Cotton*, 23 L. J. Ch. 489; *Else* v. *Else*, L. R. 13 Eq. 196.

(*y*) 127 L. T. 94.

and, after her death or re-marriage, he gave to his daughter (then a widow) the residue of his estate remaining after legacies, "but in case of her death or second marriage or her making any contract to cohabit with any man in the manner of a husband, in such case thenceforth annul and make void the powers and benefits hereinbefore given to her and will and make the whole over to her youngest four children by D. J. in equal shares." The daughter, having survived the widow, died without having married again or having cohabited with any man. Eve, J., held that the daughter took only an estate for life. He said that the testator must have contemplated one and the same period for the happening of these events—death, remarriage, cohabitation, and that he could not have intended her to take absolutely if she survived her mother, and afterwards to be deprived of the estate in the event of remarriage or cohabitation after her mother's death, and that there was no justification for treating the contingencies of the daughter's remarriage and cohabitation as qualified by the introduction of some such expression as "before the death or remarriage of my widow."

Word "payable" occurring in gift over, whether it refers to majority or the period of distribution.

(3) *Death before Legacy is "payable."*—Mr Jarman continues (*z*): "And here it will be convenient to notice the frequently occurring point of construction arising on the word 'payable,' in such a case as the following:—A money fund is given to a person for life, and, after his decease, to his children at majority or marriage, with a gift over in the event of any of the objects dying before their shares becomes *payable*. In such cases it becomes a question whether the word 'payable' is to be considered as referring to the *age* or marriage (or any other such circumstances affecting the personal situation of the legatee), on the arrival or happening of which the shares are made 'payable,' or to the actual period of distribution; in other words, whether the shares vest absolutely at the majority or marriage of the legatees, in the lifetime of the legatee for life; or whether the vesting is postponed to the period of such majority or marriage, *and the death of the legatee for life*. As the latter construction exposes the legatees to the risk of losing the testator's provision in the event of their dying in the lifetime of the legatee for life, although they may have reached adult or even advanced age, and may have left descendants, however numerous, the Courts have strongly inclined to hold the word 'payable' to refer to the majority or marriage of the legatees,

(*z*) First ed. Vol. II, p. 696.

specially if the testator stood towards the legatees in the parental relation (*a*).

Rule in *Emperor* v. *Rolfe*.

"And where (as often happens) the question has arisen under marriage settlements (*b*), the leaning to this construction is strongly aided by the occasion and design of the instrument, whose primary object obviously is, to secure a provision for the issue of the marriage. In wills, the point, like all others, depends solely upon the intention to be collected from the context; and the cases will be found to present instances of the vesting being held to take place at majority, or at majority or marriage (as the case may be), in the lifetime of the legatee for life, or to be further suspended until the period of actual distribution, according as the language of the will was deemed to admit or to exclude the more eligible and convenient construction."

But it has been expressly laid down (*c*) that the rule (which is sometimes referred to as the rule in *Howgrave* v. *Cartier* (*d*)) that a settlement is not to be read as making the provision for a child contingent on its surviving either or both of its parents, unless the intention to do so is perfectly unambiguous, is not confined to settlements, but extends to wills; and there are numerous cases on wills where the word "payable" is referred to majority and not to the period of distribution (*e*).

"Payable" referred to majority.

On the other hand, in *Bright* v. *Rowe* (*f*), the context clearly showed that by "payable" the testatrix referred to the period of distribution, so that there was no ambiguity to justify the application of the liberal canon of construction stated above.

Word "payable" referred to period of distribution.

Sir L. Shadwell took no notice of the point which was pressed

(*a*) As to confining the doctrine to cases where the testator is the parent of or stands *in loco parentis* to the legatees, see the observations of Cotton, L.J., in *Re Hamlet*, 39 Ch. D., at p. 433.

(*b*) *Emperor* v. *Rolfe*, 1 Ves. Sen. 208; *Woodcock* v. *Duke of Dorset*, 3 Br. C. C. 569; *Hope* v. *Lord Clifden*, 6 Ves. 499; *Schenck* v. *Legh* (which is a leading case), 9 Ves. 300; *Powis* v. *Burdett*, *ib.* 428; *Howgrave* v. *Cartier*, 3 V. & B. 79; *Perfect* v. *Lord Curzon*, 5 Mad. 442; *Evans* v. *Scott*, 1 H. L. C. 43; 11 Jur. 291; *Re Williams*, 12 Bea. 317; *Mount* v. *Mount*, 13 *ib.* 333; *Bailie* v. *Jackson*, 1 Sm. & Gif. 175; *Swallow* v. *Binns*, 1 K. & J. 417; *Walker* v. *Simpson*, *ib.* 713 (will); *Moor* v. *Abbott*, 26 L. J. Ch. 787; 3 Jur. (N.S.) 551; *Remnant* v. *Hood*, 27 Bea. 74; 2 D. F. & J. 396; *Currie* v. *Larkins*, 4 D. J. & S. 245; *Wakefield* v. *Maffet*, 10 A. C. 422; *Re Leader's Estate*, 17 L. R. Ir. 279. But see *Whatford* v. *Moore*, 7 Sim. 574; 3 My. & C., at p. 289; *Lloyd* v. *Cocker*, 19 Bea. 140; *Jeyes* v. *Savage*, L. R. 10 Ch. 555; *Willis* v. *Willis*, 3 Ves. 51; *Cholmondeley* v. *Meyrick*, 3 B. C. C. 253 n. (due and payable).

(*c*) *Jackson* v. *Dover*, 2 H. & M. 209; *Re Knowles*, 21 Ch. D. 806.

(*d*) 3 V. & B., at p. 85. See Hawkins on Wills (3rd ed.), p. 260.

(*e*) *Salisbury* v. *Lambe*, 1 Ed. 465 (twenty-one or marriage); *Hallifax* v. *Wilson*, 16 Ves. 168 (twenty-one); *Walker* v. *Main*, 1 J. & W. 1 (due and payable: twenty-one or marriage); *Jones* v. *Jones*, 13 Sim. 541 (payable: gift over on death under age); see also *Butterworth* v. *Harvey*, 9 Bea. 130; *Woodburne* v. *Woodburne*, 3 De G. & S. 643 (due and payable: twenty-one); *Partridge* v. *Baylis*, 17 Ch. D. 835.

(*f*) 3 My. & K. 316.

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upon him in *Jones* v. *Jones* (*g*), and which was perhaps glanced at by Sir K. Bruce in *Woodburne* v. *Woodburne* (*h*), that as the will made express provision for the issue of children there was no reason for adopting a construction the chief or only object of which was indirectly to provide for such issue. He probably considered that the terms of the ultimate gift over made that construction inevitable. The same construction, however, notwithstanding a similar argument, was adopted by the same Judge in the previous case of *Mocatta* v. *Lindo* (*i*), where the trusts of a marriage settlement, after the deaths of husband and wife, were for all and every the children of the marriage, share and share alike, to be paid and payable to them at twenty-one or on marriage, and to the children or issue of such children of the marriage as should die leaving children before their respective shares should become payable as before mentioned; but if any such children should die before their shares should become payable without leaving any issue, then over. So, in *Mendham* v. *Williams* (*k*), where after the death of the tenant for life the trust was to divide the fund equally between the testator's children, their shares to be *vested* in them as and when they should attain twenty-one or (as to daughters) be married; and to apply the income during minority for maintenance (*l*); with a gift over to the issue of any of the children who should die leaving issue before their respective shares should become due and payable; Sir W. P. Wood, V.-C., thought it was too thin a distinction to rely upon for him to say that there was here a gift over to the issue; and he held that the share of a child who attained twenty-one was not divested by her death in the lifetime of the tenant for life leaving issue.

Re Wilmott's Trusts.

But, in *Re Wilmott's Trusts* (*m*), where by marriage settlement stock was settled in trust for husband and wife successively for life, and after the death of the survivor in trust to assign, transfer and dispose of the fund unto and amongst the children of the marriage "and the issue of such of them in case any of them shall be then dead" as husband and wife should appoint, and in default of appointment unto and amongst the children of the marriage in equal shares; and in case any of them should

(*g*) 13 Sim. 561.

(*h*) 3 De G. & S. 643.

(*i*) 9 Sim. 56. See *Partridge* v. *Baylis*, 17 Ch. D. 835. See also *Wakefield* v. *Maffet*, 10 A. C. 422 (a settlement case).

(*k*) L. R. 2 Eq. 396. *Jones* v. *Jones* was relied on, but without noticing the ultimate gift over in that case. See also *West* v. *Miller*, L. R. 6 Eq. 59, where however the point was not alluded to; *Re Thompson's Trust*, 5 De G. & S. 667.

(*l*) As to the effect of this clause on the vesting in such a case, see *ante*, p. 1382.

(*m*) L. R. 7 Eq. 532, discussed in *Re Leader's Estate*, 17 L. R. Ir. 279.

happen to be dead leaving issue, unto the issue of such one or more as should be then dead (*per stirpes*), equally to be divided amongst the children or their issue, to each being a son at his age of twenty-one, and to each being a daughter at her age of twenty-one or day of marriage; and in the meantime until their shares should become payable as aforesaid, to pay the income for maintenance; and in case any or either of the children should die without issue before his, her or their share or shares should become due and payable, in trust to pay such share or shares to the survivors of the children and the issue of any one or more who should be dead leaving issue, in equal shares and when and as the original shares should become due and payable; and in case, at the death of the survivor of the husband and wife, there should be no child of the marriage, nor any issue of such child living, or if there should be any such then living, yet if all of them should die before his, her or their share or shares were payable, then over. A son attained twenty-one and died without issue in the lifetime of the surviving tenant for life. It was held by Sir W. M. James, V.-C., that as provision was made for the issue of any child dying before the tenant for life, the rule of construction founded on *Emperor* v. *Rolfe* did not apply, and that the share of the deceased son went over to the surviving children of the marriage. He said that in *Mocatta* v. *Lindo*, it was held that "payable" there meant vested (*n*). "I am bound to say (he added) I do not think I should have held upon that instrument that 'payable' meant 'vested.' In this case," he continued, "there is no question about vesting at all. The question is one of divesting. The gift to the issue of a child dying does not depend upon the death of the child under twenty-one, as in *Mocatta* v. *Lindo* and *Mendham* v. *Williams*; but the gift to the issue of a child dying is to take effect upon the death of that child at any time during the life of the tenant for life."

Observations of James, V.-C., on *Mocatta* v. *Lindo*, and *Mendham* v. *Williams*.

It will have been observed that in the cases referred to by the V.-C., the gift over to issue was to take effect on the death of a child before his share "became payable," and that it was only by construction that the gift depended on the death of a child under twenty-one. The distinction, however (whether it exactly answers those cases or not), appears to have this basis—that where the gift to issue is unequivocally intended to depend upon the death of a child under twenty-one, "payable" (occurring in a gift over upon the death of a child without issue) may properly be held also to refer to the age of the child, since that

(*n*) Qu. The interests of the children were clearly vested at birth. The question was (as in *Re Wilmott's Trusts*), one of divesting, and was not treated by the Court as one of vesting. But much of the phraseology of these cases was borrowed from those on portions charged on realty.

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is the period clearly indicated by the alternative clause, and if the word were held to refer to the death of the tenant for life (either specifically, or as being the period of actual distribution), it would follow that a child attaining twenty-one, and afterwards dying without issue in the lifetime of the tenant for life would himself lose the share, while the issue would not get it.

The effect of an express provision for the issue of the legatee was again discussed in *Haydon* v. *Rose* (*o*), where a testator gave real and personal estate to his son A for life, and after his death to be sold and the proceeds to be paid and divided among the testator's eleven grandchildren as and when they should respectively attain twenty-one, with the gift of the income of each share for maintenance; the share (accruing and original) of any grandchild who should die before such share should become *payable* without leaving a child was then given to the survivors; and the share of any grandchild who should die before such share should become payable leaving children was given to the children : notwithstanding *Re Wilmott's Trusts*, it was held by Lord Romilly, M.R., that the share of a grandchild who attained twenty-one was not divested by his death in the lifetime of the tenant for life.

On the other hand, in *Day* v. *Radcliffe* (*p*), where money was settled in trust for A and her husband successively for life, and after their several deaths in trust to pay, divide, transfer or assign the fund to the children of A and the issue of such children, to be paid to such as should be sons at twenty-one and to such as should be daughters at twenty-one or marriage, the issue of any child dying before his or her share should become payable to be entitled to the share which the parent would have been entitled to if living; but in case A should die without leaving any issue as aforesaid then to pay, transfer or assign the fund as A should by deed or will appoint. A son of A attained twenty-one, and afterwards died in the lifetime of A leaving issue. It was held by Sir G. Jessel, M.R., that independently of authority there could be no doubt that "before his share becomes payable" meant before the period of distribution, and that the representative of the deceased son was therefore not entitled to a share. "One remark," he said, "which strongly tends to show this to be the meaning is, that if you read 'payable' as 'vested,' . . . the provision in favour of issue can never take effect as regards daughters, for a daughter cannot

(*o*) L. R. 10 Eq. 224. The gift of income for maintenance appears to have made this an immediately vested interest.

(*p*) 3 Ch. D. 654. Cf. *Re Thompson's Trust*, 5 De G. & S. 667.

have children until she is married, and if she marries her share becomes vested" (*q*).

Again, in *Chell* v. *Chell* (*r*), where a testator gave his real and personal estate to trustees in trust for his wife for life, and after her death for all and every of his children share and share alike until the youngest attained twenty-one, and on that event happening in trust for all and every of his children share and share alike and for their respective heirs and assigns; provided that if any of his children should die before their shares became transferable and *payable* without leaving issue, their shares should be transferred and paid equally among the survivors at such time as their original shares were made payable; but if any of his children should die before their shares became *payable* leaving issue, then the trustees were to transfer and pay the shares of such deceased children to their issue when they attained twenty-one. One of the children, who was living when the youngest attained twenty-one, died in the lifetime of the wife leaving issue; and it was held by Sir C. Hall, V.-C., on the authority of *Re Wilmott's Trusts*, that the share of the deceased child was divested by the substitutionary gift. He said that the gift in *Haydon* v. *Rose* was to children at twenty-one (*s*), and that was quite sufficient to distinguish it.

It is not stated whether the distinction here intended is between a vested and a contingent gift, or between a time named for payment which is, and one which is not, personal to the legatee. Probably the latter, since the word "payable" seems to be as properly referable to the time of actual distribution (*t*), where the gift is contingent as where it is vested; since in either case the legatee must outlive the age or time named to acquire an indefeasible interest.

Result of the cases.

In this state of the authorities, it seems not to be too much to say that the word "payable," occurring in the executory bequests under consideration, is held to apply to the age or marriage of the legatee, and not to the period of the death of the legatee for life, unless the latter is shown by the context to be intended by the testator: but that, according to the great preponderance of present judicial opinion, an intention in favour of the latter will be inferred where in the event of the legatee dying

(*q*) See, however, *Mendham* v. *Williams*, L. R. 2 Eq. 396.
(*r*) 23 W. R. 252; [1875] W. N. 6.
(*s*) But see *ante*, p. 2114.
(*t*) As distinguished from the specific period of the death of the tenant for life. If this period were taken, then, in the event of the legatee outliving the tenant for life but dying under age, both the contingent gift to himself and the gift over to his issue would fail.

at any time during the life of the tenant for life leaving issue, the legacy or share is given to the legatee's issue (*u*): and similarly that an intention in favour of the actual period of distribution will be inferred where the legacy or share is given to the issue in the event of the legatee dying before the legacy or share becomes payable (*x*). This is said to be the natural meaning of the words, and to satisfy them and acquire an absolute interest the legatee must both attain twenty-one and survive the tenant for life.

Construction not varied by tenant for life dying before majority of legatee.

It is presumed that if upon the true construction of the will "payable" applies to the age or marriage of the legatee, the construction will not be varied by the accident of the legatee for life dying before the majority or marriage of the legatee in remainder; but that the interest of the latter will remain liable to defeasance during minority or until marriage (*y*).

Where no time fixed for payment "payable" refers to period of distribution.

But if no time is specified for payment, the word "payable" in the gift over will be held to refer to the death of the tenant for life, and the legatee in remainder must survive him in order to take (*z*). The only alternative would be to consider that it was intended to prevent a lapse, a construction which, as we have seen, the Courts do not readily adopt.

So under gift to such as survive tenant for life, notwithstanding time fixed for payment.

Again, if the original bequest be to such children only as survive the tenant for life, to be paid at twenty-one, with a gift over if all the legatees die before their shares become payable, the word "payable" will, as it would seem (*a*), bear its ordinary meaning, and the gift over will take effect if none of the legatees survive the tenant for life, although they have attained the age of twenty-one; otherwise both the original gift and the gift over would fail; since by no construction could the word "payable" be held to enlarge the class entitled under the original bequest.

Where no prior life estate and no time fixed for payment.

If an immediate legacy is given without specifying a time for payment, and is given over in case the legatee dies before it becomes payable, the word "payable" can only have reference

(*u*) *Re Wilmott's Trusts*, L. R. 7 Eq. 532, *ante*, p. 2112.

(*x*) *Day* v. *Radcliffe*, 3 Ch. D. 654; *Chell* v. *Chell*, 23 W. R. 252. If it be real estate which is thus given over to the issue, there is this additional reason against applying "payable" to the age of the legatee, *viz.*, that a rule of construction which was designed to let in the issue ought not thus to be used to exclude all but one of them, *viz.*, the heir-at-law (see *per* Hall, V.-C., 23 W. R. at p. 253).

(*y*) See *Williams* v. *Clark*, 4 De G. & S., at p. 475.

(*z*) *Creswick* v. *Gaskell*, 16 Bea. 577. See also *Crowder* v. *Stone*, 3 Russ. 217, *ante*, p. 2035, where the point seems to have been assumed.

(*a*) See *per* Shadwell, V.-C., *Bielefield* v. *Record*, 2 Sim., at p. 358. See also *Jeffery* v. *Jeffery*, 17 Sim. 26 (deed); *Hind* v. *Selby*, 22 Bea. 373. And see *Farrer* v. *Barker*, 9 Hare, 737.

to the death of the testator (*b*). And even where the legacy (whether immediate or after a prior life estate) is directed to be paid at a particular age, as twenty-one, and is given over in case the legatee dies before it becomes "payable," the gift over takes effect if the legatee dies before the testator, although he may have attained the age. The legacy has not become payable in fact, and the only effect of holding "payable" in this case to mean "attain twenty-one" would be to cause a lapse (*c*). The legatee must survive both events, the time appointed for payment (*d*) as well as the death of the testator.

Where time fixed but legatee predeceases testator.

Although the very word "payable" is the most apt to connect itself with a previous direction to "pay," a similar construction has obtained in cases where the gift over was on death before becoming "entitled in possession" (*e*), or "entitled to the payment" (*f*), or "to the receipt" (*g*), or before the legacy is "received"—read "receivable" (*h*).

"Entitled in possession," etc.

(4) *Death before Legacy is "vested."*—The proper legal meaning of the word "vested" is vested in point of interest (*i*). But its natural and etymological meaning is said to be vested in possession (*k*): and there are many cases of gifts over on the death of the legatee before his legacy has become "vested," where upon the context the word has been held to bear the latter sense. Thus where an immediate legacy, vested at the testator's death, with a direction for payment at twenty-one, was followed by a gift over in case the legatee should die before it became vested as aforesaid, this was held to mean die before twenty-one (*l*).

Gift over on death before "vesting" of immediate legacy;

So where a vested remainder to children was followed—in one case by a gift over "if any die before or after me and before their

—— of legacy possession of which is deferred.

(*b*) This is the view expressed by Messrs. Wolstenholme and Vincent, in the 3rd edition of this work, Vol. II, p. 744, and in support if it they cite *Cort* v. *Winder*, 1 Coll. 320. See also *Whitman* v. *Aitken*, L. R. 2 Eq. 414, and *Collins* v. *Macpherson*, 2 Sim. 87. Mr. Theobald, however, thinks that the gift over would take effect if the legatee died within the executors' year (Wills, (8th ed.), p. 778). Compare *Re Arrowsmith's Trusts*, 29 L. J. Ch. 774, *post*, p. 2121.

(*c*) *Walker* v. *Main*, 1 J. & W. 1, as explained *ante*, p. 2090, n. (*g*); *Re Gaitskell's Trust*, L. R. 15 Eq. 386 (direction to vest at twenty-one, with gift over on death before attaining a vested interest).

(*d*) *Jenkins* v. *Jenkins*, Belt, Supp. Ves. 264.

(*e*) *Re Yates's Trust*, 21 L. J. Ch. 281; 16 Jur. 78; *Re Mary Whiter*, 105 L. T. 749 (entitled as aforesaid—real estate).

(*f*) *Re Williams*, 12 Bea. 317 (settlement).

(*g*) *Hayward* v. *James*, 28 Bea. 523.

(*h*) *West* v. *Miller*, L. R. 6 Eq. 59. As to reading "received" as "receivable," see *post*, p. 2119.

(*i*) *Richardson* v. *Power*, 19 C. B. (N.S.) 780; *Creeth* v. *Wilson*, 9 L. R. Ir. 216. The question as to the meaning of "vested" is also discussed in Chap. XXXVII, *ante*, p. 1325.

(*k*) *Young* v. *Robertson*, 4 Macq. 314; 8 Jur. (N.S.) 825.

(*l*) *Sillick* v. *Booth*, 1 Y. & C. C. C., at p. 121.

shares become vested interests" (*m*)—and in another by distinct gifts over, "if any die before me" leaving issue, and, if any die "before their shares become vested" leaving no issue (*n*) in both these cases "vested" was held to mean vest in possession by the death of the tenant for life. A similar decision was made where the remainder was to and among several, and "if any die without leaving issue before his share vests in him then to be equally divided among the survivors," "survivors" *per se* being considered to be referable to the death of the tenant for life (*o*): and again where a remainder to children was followed by a gift over, if all died before attaining a vested interest, to the then next-of-kin of the testator and the then next-of-kin of his wife the tenant for life (*p*).

The simple case, unaffected by context, of a gift, vested in interest at the testator's death, but postponed in point of possession, does not appear to have presented itself for interpretation. And it seems doubtful whether, in a divesting clause, a departure from the proper technical sense would be justified merely because that sense imputes to the testator an intention to provide only for death in his own lifetime, and to do so, not by the obvious and simple words "die before me," but by "a circumlocution which is at least of ambiguous import" (*q*).

At any rate the ordinary meaning of the word "vested" is "vested in interest" and not "vested in possession," and the Court is reluctant to construe the word as meaning vested in possession unless the context fixes this meaning on the word (*r*).

"Entitled."

The word "entitled" may refer to the right or to the possession. It has no technical meaning and in most cases will depend on the context for its effect; in the absence of an explanatory context the word is construed as referring to the possession and not to the right (*s*).

(*m*) *King* v. *Cullen*, 2 De G. & S. 252.

(*n*) *Re Morris*, 26 L. J. Ch. 688; 5 W. R. 423.

(*o*) *Young* v. *Robertson*, 4 Macq. 314; 8 Jur. (N.S.) 825. But see *ante*, p. 2070, note (*z*).

(*p*) *Greenhalgh* v. *Bates*, L. R. 2 P. & D. 47.

(*q*) See Lord Cranworth's remark on this circumlocution in *Young* v. *Robertson*, *supra*, p. 2070.

(*r*) *Re Arnold's Estate*, 33 Bea. 163; *Parkin* v. *Hodgkinson*, 15 Sim. 293; *Richardson* v. *Power*, 19 C. B. (N.S.) 780 in Exch.; and see Chap. XXXVII.

(*s*) *Turner* v. *Gosset*, 34 Bea. 593; *Re Noyce*, 31 Ch. D. 75; *Re Maunder* stated below; and see *Beale* v. *Connolly*, Ir. R. 8 Eq. 412 (settlement). *Re Crosland*, 74 L. T. 238, is a different type of case there being no preceding life estate.

The case of *Commissioners of Charitable Donations* v. *Cotter*, 2 D. & Wal. 615; 1 D & War. 498 which was reluctantly followed by Knight-Bruce, V.-C., in *Henderson* v. *Kennicot*, 2 De G. & Sm. 492, is founded on *Doe* v. *Prigg*, 8 B. & C. 231 (which is no longer law; see *Re Gregson's Trust Estate*, 2 D. J. & S. 428 and *Re Maunder*, *infra*). *Fry* v. *Lord Sherborne*, 3 Sim. 243, was also cited in *Henderson* v. *Kennicot*.

Thus in *Re Maunder* (*t*) the testatrix directed her trustees to pay the income of her residue to her son's widow for life, and after the death of the widow to divide the residue amongst all the children of her said son; and in the event of either of her grandchildren "dying before becoming entitled to any share of my estate hereinbefore in anyway disposed of" she directed that the child or children of such deceased grandchild should take the parent's share, or, if there should be no such child or children then that such share should vest equally in all her surviving grandchildren. It was held that "entitled" meant "entitled in possession."

And if the legacy vests at birth in persons who must necessarily be born after the testator's death, the sense of entitled in interest is almost necessarily excluded, since they cannot die before becoming so entitled (*u*).

Gift over on death before "receiving";

(5) *Death before "receiving" a Legacy.*—Executory gifts over in the event of legatees dying before "receiving" their legacies have given rise to much litigation. Actual receipt may be delayed by so many different causes that the Court is unwilling to impute to the testator an intention to make that a condition of the legacy, and thus indefinitely postpone the absolute vesting of it. If, therefore, the will points out a definite time when the right to receive the legacy accrues, either expressly, as by directing payment at a particular age or time (*x*), or by implication from the dispositions of the will, as upon the determination of a prior life estate (*y*), the gift over will be referred to that time. And if there is a direction to pay at a specified time, as well as a prior life estate, the case falls within the decisions already noticed respecting gifts over on death before the legacy is "payable."

—— construed receivable when the will points out a time for payment.

Thus in *Rammell* v. *Gillow* (*z*), where a testator bequeathed his property to trustees in trust to sell, to invest the proceeds, and to pay an annuity of £200 to his wife during widowhood; and as to the residue during her life, and after her decease as to the whole, in trust to pay and divide the same equally amongst his children born or to be born as well sons as daughters as and

(*t*) [1902] 2 Ch. 875, affirmed, [1903] 1 Ch. 451. See also *Re Mary Whiter*, 105 L. T. 749.

(*u*) See *Jopp* v. *Wood*, 2 D. J. & S. 323 (settlement), where note that there was only one gift over of the whole fund in the event (which did not happen) of all the legatees dying before becoming entitled.

(*x*) *Whiting* v. *Force*, 2 Bea., at p. 573.

(*y*) *Re Dodgson's Trust*, 1 Drew. 440. See also *Wilks* v. *Bannister*, 30 Ch. D. 512; *Re Miles*, 61 L. T. 359. In *Girdlestone* v. *Creed*, 10 Hare, at p. 487, a gift of "what I have received from the estate of A" was held to pass property so derived though not received.

(*z*) 15 L. J. Ch. 35; 9 Jur. 704.

when they should respectively attain twenty-one; but in regard to such of his children as had already attained that age he directed their shares to be paid to them at the expiration of twelve months after his wife's decease, or so soon after as the trustees should have assets in their hands; but, in the event of the decease of any of his said children, sons or daughters, before they should have received or become possessed of their divisional share aforesaid, leaving issue, their share was to go to their children. Three of the sons (the plaintiffs) had attained twenty-one at the date of the will. The widow was still living. Wigram, V.-C., said, "If the widow had taken a life interest in the whole of the property, and if the clause which relates to the case of some of the children who had already attained the age of twenty-one years had directed that all the children should not receive what was given to them until the expiration of twelve months after the death of the widow, there would, I think, have been a very plausible ground for contending that the payment being postponed merely for the convenience of the life estate of the parent, the case ought to be dealt with as in the cases referred to by the plaintiffs (*a*). If, on the other hand, no part had been given to the widow, it appears to me to be impossible, without direct violence to the language of the will, and that without any reason for violating it, that the Court should put a different construction on it from that which it naturally bears." Here part was given to the widow for life, and part not; and the V.-C. thought that in a case in which it was impossible to say what the testator had in his contemplation, the reasoning that would apply to the part that was given to the widow for life could not be transferred to the rest. As to the shares of the plaintiffs, therefore, he held that they could not be dealt with as in the cases referred to, but would go over if the legatees died before "receiving" their shares. "What that means," he added, "I need not decide. . . . If the widow were to die, and at the end of a year one of them had not received anything, and that child was to die, I do not mean to say that that share would go over, because it had not been actually received." As to children who had attained twenty-one since the date of the will (to whom, it will be observed, as well as to the plaintiffs, the gift over applied), he held that they took vested interests not liable to be divested.

When referred to end of one year after testator's death.

If no such period is indicated by the particular will it becomes a question whether there is not some time at which, according to the general law regulating the subject, the gift may properly be

(*a*) *Viz.*, *Schenck* v. *Legh*, etc., *ante*, p. 2111, n. (*b*). See accordingly *West* v. *Miller*, L. R. 6 Eq. 59.

said to be receivable and to which the testator may fairly be supposed to refer. Thus in *Re Arrowsmith's Trusts* (*b*), where a testator gave his money out on security that should be due to him at his decease in trust to be paid and divided unto and between his nephews and nieces who should be then living, with a gift over, in case any of them should die "before receiving their respective shares," to the surviving nephews and nieces; it was held by Sir R. Kindersley, V.-C., that "die before receiving" meant die within one year after the testator's death, that being the period which is generally allowed to executors for the getting in and distribution of their testator's estates, and at the end of which the shares might be said to be receivable (*c*). The words could not be construed "die before the testator," because the original gift was expressly to persons living at the testator's death, and that construction would render the gift over inoperative. This gave an indefeasible interest to all but one niece, who alone died within the year. On appeal, K. Bruce and Turner, L.JJ., agreed with the rest of the decision, but as to the share of the deceased niece, a decision having become unnecessary, Sir K. Bruce would not give any opinion, and Sir G. Turner said he was disposed to think an inquiry ought to have been directed whether any part of the fund was received or could properly, having regard to the state of the assets, have been paid over within the year. The executors, according to general rules (he said), might have paid it, but the V.-C.'s decision, that the gift over would take effect on death within the year, would prevent their making any payment within that period. . . . "There are two periods to which the words may refer, the period when the fund was actually got in, or the period when it could have been paid over to the legatees. To refer them to the former period would be a most inconvenient construction." He therefore preferred the inquiry.

Re Arrowsmith's Trusts.

Whether Court may inquire whether receipt within the year was possible.

Again, in *Re Collison* (*d*), where a testator gave real and personal estate to trustees in trust to sell and out of the proceeds to pay debts and an annuity and to set apart a fund for the latter and subject thereto to divide the residue into six parts unto and among his six nephews and nieces (named), the shares of nephews to be paid as soon as practicable, the shares of nieces to be invested and the income paid for their separate use; in case any of his nephews should die before him or before the

(*b*) 29 L. J. Ch. 774; 30 *ib.* 148; 6 Jur. (N.S.), at p. 1232; 7 *ib.* 9; 2 D. F. & J. 474. See also *Re Chaston*, 18 Ch. D. 218; *Re Wilkins*, *ib.* 634.

(*c*) So in *Brooke* v. *Lewis*, 6 Mad. 358, a gift to such as should be living at the time of *distribution* was held to mean at the end of one year from the testator's death.

(*d*) 12 Ch. D. 834.

division of his estate their shares to go to their children if any, if no children then to the remaining legatees; there was a similar gift over of the shares of nieces. A niece died unmarried within one year after the testator's death; Sir E. Fry, J., adopted Sir R. Kindersley's reasoning in *Re Arrowsmith's Trusts*, and held that the reasonable and convenient interpretation of "division" was the year allowed by law for division. It was argued that the deceased niece was at all events entitled to her share of what might have been paid before her death. But the Judge said that though there was some authority for directing an inquiry when a division might have been made, "the decision in *Hutcheon* v. *Mannington* (*e*) proceeded on the extreme difficulty of deciding whether a thing might or might not have been done. I should (he added) be directing an inquiry of the description which Lord Thurlow rejected in that case, and such as the House of Lords in *Minors* v. *Battison* (*f*) held ought not to be directed. Moreover . . . it must rest with those who say that a division ought to have been made earlier (than the end of the year) to adduce evidence that it could. So far as the evidence goes in the present case it shows the contrary. . . On that ground, independently of any other, I should reject the presumption that the estate could have been divided at an earlier period."

Inquiry rejected.

Of the two cases here referred to, *Minors* v. *Battison* will be stated presently, and will (it is submitted) be found not directly to raise the point here in question. But *Hutcheon* v. *Mannington* (*g*) is both an illustration of the extreme reluctance of the Court to read a gift on death before "receiving" as referring to actual receipt, and an important authority on the propriety of directing an inquiry whether the legacy could or could not have been received before the death of the legatee.

Hutcheon v. *Mannington*. Inquiry, what *might* have been received rejected as impracticable.

In that case a testator, after reciting that his fortune, consisting of £8,627, was all vested in Indian securities, gave several legacies, and annexed to each a gift over if the legatee should die before he "may have received" it. Then, after calculating the amount of the residue, he gave it to his father "but in case of his death before he may have received the rest and residue of my estate before mentioned," then over. The father survived the testator some three years, and died without having received any part of the residue. For the plaintiffs, claiming under the gift over, it was argued that the testator, having express regard to the situation of his property, intended

(*e*) 1 Ves. jun. 366.
(*f*) 1 A. C. 428.
(*g*) 1 Ves. jun. 366, cit. 6 *ib.*, p. 536, and see the judgment more shortly and in some respects differently stated, 4 B. C. C. 491 n.

it to go over if the legatee did not live to receive it; that if real estate were given in trust to sell with all possible diligence, the Court would inquire into that; so here there ought to be an inquiry within what time he might have received it; the plaintiffs insisting that the estate could not have been got in before his death. Lord Thurlow said: "Suppose any of these legatees had died within a year after the testator, there might then have been some ground for saying, that the testator alluded to the known practice of the Court to compute interest upon legacies from a year after the death of the testator. I rather believe, he had some such purpose, as you attribute to him, in his contemplation. There is a faint indication of a purpose, that there shall be some time or other, when these interests shall go over, and that they shall not vest in the meantime. But has he conceived that intention, and expressed it with such definite certainty, that I can act upon it? I am to compute, what time would be sufficient to enable these parties to receive their legacies. It is all too uncertain. . . . Suppose he had given a real estate in the manner you specify; it is clear, that it will neither depend upon the caprice of the trustee to sell, for that would be contrary to all common sense, nor upon his dilatoriness: in some way it may be sold immediately: but I should not inquire when a real estate might have been sold with all possible diligence; for it might be the very next day or that very evening; and therefore the Court always in such a case considers it as sold the moment the testator is dead; for where there is a trust, that is always considered here as done, which is ordered to be done, and the Court cannot measure the time. Suppose this property had been in the West Indies instead of the East, it would have taken less time to be remitted; still less if in Jersey or Cumberland; and if only 100 miles off, it would have cost a journey of two days at least. In this case it is an immeasurable purpose. I can do nothing with it; and it must be considered as vested from the death of the testator."

Lord Eldon's observations on *Hutcheon* v. *Mannington.*

Of Lord Thurlow's construction of the words "may have received," Lord Eldon (who was the plaintiff's counsel in the case) repeatedly expressed his disapproval. On one occasion he said, "The natural construction of that will was, if the legatee should die, before the property should be actually remitted to him. But Lord Thurlow . . . thought himself at liberty to put a construction upon the will, that might by possibility be put upon it; supposing an intention, that there should be an inquiry as to each and every part, when it might be said that it could have been received" (*h*). And on another occasion he said

(*h*) 11 Ves., at p. 497.

he thought the construction was "too bold"; and that Lord Thurlow "thought there was an indication of a purpose, such as was contended for by the plaintiff: but that it was impossible to inquire, when each and every part of the estate could have been received, collected, and got in" (*i*).

As to the decision that it was impossible to inquire when the legacy might have been received, Lord Eldon said (*k*): "Whatever may be the difficulty of construing the expressions in *Hutcheon* v. *Mannington*, whenever a testator directs his executors to mortgage, sell, or convert his estate into money, and divide it among other persons, this principle is clear; that no fraudulent or unnecessary dilatory dealing by trustees shall affect third persons. The duty of the Court would require them to discuss as a fact that loose expression 'what they might have received.'"

And in *Law* v. *Thompson* (*l*), where the gift over annexed to a simple legacy was in case of the legatee's death "before the said sum be paid into his hands," and the executors having renounced, great delay occurred in remitting the assets from India, so that the legatee died before payment; Sir J. Leach, M.R., held that though this meant actual payment, the rights of the legatee could not be defeated by the accidental circumstances of the case, and therefore he directed an inquiry whether, if the will had been proved by the executors, and reasonable diligence had been used by them, any and what part of the testator's property given to the legatee could have been remitted to him in his lifetime.

An inquiry extending over the lifetime of the legatee appears to differ from an inquiry limited to one year (such as was advocated by Sir G. Turner) only in the amount of labour involved.

Is a gift over, on death without actually receiving, valid? Early opinions, pro.

Hitherto, it has been assumed that if the testator clearly intends the legacy to be divested unless actually received by the legatee, such intention will prevail. Such was clearly the opinion of Lord Eldon, Sir W. Grant, and Sir J. Leach. Lord Eldon, in an often-cited judgment (*m*), says: "I admit the soundness of the proposition, . . . that, if a testator thinks proper, whether prudently or not, to say distinctly, showing a manifest intention, that his legatees, pecuniary or residuary, shall not have the legacies, or the residue, unless they live to receive them in hard

(*i*) 6 Ves., at p. 536.

(*k*) *Gaskell* v. *Harman*, 11 Ves., at p. 507; and see the inquiry directed in that case.

(*l*) 4 Russ. 92.

(*m*) In *Gaskell* v. *Harman*, 11 Ves., at p. 497.

money, there is no rule against such intention, if clearly expressed. But that would be open to so much inconvenience and fraud, that the Court is not in the habit of making conjectures in favour of such an intention. In the case of *Hutcheon* v. *Mannington*, I admit, I thought the meaning of those words was, what they shall have received; and I thought so even after the decision. The use I have since made of that case is as an authority, that, if the words will admit of not imputing to the testator such an intention, it shall not be imputed to him." And Sir W. Grant said (*n*), that Lord Thurlow proceeded on the ground "that he was called upon to determine, not, whether any particular event had or had not happened before the death, but, whether an event might by possibility have happened." That is to say, Lord Thurlow held the words to mean something that he thought was void, rather than hold them to mean something so inconvenient (because valid) as "die before he shall have received."

Martin v. *Martin*, *contra*.

But *Hutcheon* v. *Mannington* has been cited in recent times as deciding that a gift over, if the legatee dies without actually receiving his legacy, is void. Thus, in *Martin* v. *Martin* (*o*), where a testator gave his property to be equally divided among his nephews and nieces, and if any of them should die before him or before they should have actually received what was to go to them under the will, their share to go over; it was held by Sir W. P. Wood, V.-C., that the gift over was void. He said, "It is a common impression on testators' minds that the event may occur of death before actual receipt of property given. The law has interfered on account of the extreme difficulty of meeting such a wish. In *Hutcheon* v. *Mannington* Lord Thurlow uses the expression, 'It is an immeasurable purpose.'"

The gift over upheld in *Whitman* v. *Aitken*.

But, as already noticed, Lord Eldon dissented from the construction adopted in *Hutcheon* v. *Mannington*, precisely because the words there used were held *not* to mean "before actually receiving" (*p*). And no doubt of the validity of a divesting clause depending on actual receipt was suggested in *Whitman* v. *Aitken* (*q*), where to a simple legacy was annexed a gift over if the legatee should die before the legacy was actually paid or payable to him. The legatee died a few months after the testator, and effect was given to the gift over by Sir J. Stuart, V.-C., who construed the clause as providing for two events—death in his own lifetime, which would be before the

(*n*) 8 Ves., at p. 555.
(*o*) L. R. 2 Eq. 404; see also *Re Kirkbride's Trusts*, *ib.* 400.
(*p*) And see the observations of Fry, J., on this case in *Re Chaston*, 18 Ch. D., at p. 227.
(*q*) L. R. 2 Eq. 414.

CHAPTER LVII.

legacy was payable, and death after his own decease without having been actually paid.

Minors v. *Battison.*

However, in *Minors* v. *Battison* (*r*), Lord Thurlow's decision was again referred to as denying the validity of a gift over on death without actually receiving. *Minors* v. *Battison* did not directly raise this point; but it is a case which requires consideration :—a testator gave his real and personal property to trustees in trust for his wife for life, after whose death there was a provision (whether a trust or only a discretionary power was the principal question in the case) for sale of the property and for division of the proceeds among the testator's children; and if any child should survive the wife and die before he or she should have received his or her share, such share was given over. The eldest son survived the wife more than a year, but died before any sale was made, and the question was whether his share was divested by the gift over. Sir C. Hall, V.-C., held that it was not, being of opinion that it was a trust and not a power; and he declared that for the purposes of distribution the estate ought to be considered as sold and converted at the expiration of twelve months from the death of the testator's widow. This was reversed by the L.JJ., who held that there was no trust, but only a power to sell at the absolute discretion of the trustees. They, as well as the V.-C., construed "received" as *de jure* receivable; but held that the shares did not become *de jure* receivable until the trustees chose to sell : the exercise of their discretion as to any part fixed the time as to that part. But the original decision was restored in D. P.

Lord Selborne's observations in *Minors* v. *Battison.*

Now, as it was not contended that actual receipt was meant, the validity of a divesting clause which does mean that, was not in question (*s*). But Lord Selborne made some observations on that question. Referring to the clause in that case, he said, "These words, in their *prima facie* natural sense (from which there is nothing in the context to authorize any departure), relate

(*r*) 1 A. C. 428. The statement in the text, except of the gift over, is much abridged. The opinions of the V.-C. and of the L.JJ. are collected at pp. 432, 436, 438, 446, 447, 453.

(*s*) For the same reason the propriety of a general inquiry whether a legacy might or might not have been received did not come in question. An inquiry whether the share of the deceased son might have been received within the year was immaterial, since he outlived the year. No inquiry of either kind was asked for by either side. But in *Re Collison*, *supra*, p. 2121, Sir E. Fry cited Lord Selborne's statement of what Lord Thurlow said, and added, "if that be so, it follows that I must reject the actual time of division of a part or of the whole of the estate, and, if I must reject the time of the actual division as too uncertain, the time when any part of the estate might have been divided is *a fortiori* too uncertain." Thus only through Lord Selborne's observations and only by inference from them has *Minors* v. *Battison* any bearing on the question of an inquiry.

to the death of a child during the interval between the death of the widow and the time when that child's share might be actually received, or at least *de jure* receivable. It was decided, in *Hutcheon* v. *Mannington*, and *Martin* v. *Martin*, that such a divesting clause, if it refers to the time of actual receipt, is too uncertain and indefinite to be capable of being carried into effect. Lord Thurlow said, in the former of those cases, that it would be contrary to common sense to make the divesting of a vested interest depend upon the caprice or upon the dilatoriness of the trustee to sell (*t*); that in some way the property *might* be sold immediately . . . that where there is a trust that is always considered in equity as done which is ordered to be done; and that the Court cannot measure the time."

Effect where part has been received and part not.

But besides this Lord Selborne held that there the divesting clause failed, on the ground that what was given over was "such share," spoken of as a whole, and the testator had not with sufficient clearness for a divesting clause declared what was to go over in the event which had happened of part having been received or become receivable (which latter it was conceded satisfied the clause) and of part not having been received or (according to the L.JJ.) become receivable. In his opinion the estate became *de jure* distributable at the time of the widow's death, and "on this one point he differed from the decision of the V.-C." To meet this view the order was varied, and it was declared that in the events which happened the deceased son took an absolute vested interest in a share of the estate, "the whole being considered as converted into money and distributable immediately upon the death of the widow."

Order in *Minors* v. *Battison*.

This variation, though not material to the decision of the case, would seem to be very material in principle; for it annihilates the interval clearly contemplated in the divesting clause between the death of the widow and the time of "receipt," and thus appears to adopt (perhaps under the circumstances without much consideration) the opinion that the clause, whether it meant received or receivable, was entirely void, though for which of the reasons given by Lord Selborne does not appear.

Gift over of the legacy, or of the unreceived part, upheld.

The general question of the validity of such a clause was fully discussed in *Johnson* v. *Crook* (*u*), where residue was bequeathed

(*t*) There is here an important variation from Lord Thurlow's real words, making it appear that he thought a divesting clause to take effect on death before actual receipt could properly be rejected on the ground that it would make the rights of legatees depend on the caprice of the trustee. Even with regard to a trust for sale, what he did say, though generally true, is not universally so: for the testator may have intended that those rights should depend on the actual sale, *per* Grant, M.R., 8 Ves., at p. 556.

(*u*) 12 Ch. D. 639. See *Re Potts*, [1884] W. N. 106.

equally between A and B; "but if A shall die before he shall actually have received the whole of his share and without leaving issue, then, and whether the same shall have become payable or not, his share or such part or parts thereof as he shall not have actually received as aforesaid shall be paid to the said B." A survived the testatrix some seven years, and died without receiving any part of the residue and without leaving issue. Sir G. Jessel, M.R., held that the intention to use the words "actually received" in their literal sense was placed beyond doubt by the addition of the words "whether payable or not"; that the latter words provided for non-receipt from any cause whatever, including fraud, accident or mistake; that there was no uncertainty or difficulty in ascertaining whether the event had happened; and that the gift over had taken effect. He examined the cases, and arrived at the conclusion that *Martin* v. *Martin* was the first in which such a gift over was held void; that it was so decided simply *per incuriam*; and that although some of Lord Selborne's expressions in *Minors* v. *Battison* were difficult to deal with, the point did not directly arise in that case.

Johnson v. *Crook* (*x*) was not followed in *Bubb* v. *Padwick* (*y*), but it has been followed by Fry, J., in *Re Chaston* (*z*) and *Re Wilkins* (*a*), and by Eady, J., in *Re Goulder* (*b*); but the difficulty caused by the Order in *Minors* v. *Battison* was not dealt with.

In *Bubb* v. *Padwick*, the will was peculiar, the intention being express that the shares should be vested in interest, *i.e.*, transmissible (*c*), though payment was postponed, yet that they should be divested, *i.e.*, not be transmissible, unless actually paid; which is contradictory. The Court, however, relied on no such special ground.

Gift over of "the share" of a legatee dying "before the execution of the trusts."

In *Roberts* v. *Youle* (*d*), a testator gave his real and personal property to trustees for sale, with authority to postpone the sale, and in trust to divide the proceeds among his three sons and his daughter (naming them), but directed the trustees to retain his daughter's share on certain trusts for her and her issue; "and in the event of any of his said children dying before his (testator's) decease or the execution of all or any of the trusts of the will leaving issue, he directed the trustees to pay to the issue of such deceased child or children the share or respective shares, his, her

(*x*) 12 Ch. D. 639.
(*y*) 13 Ch. D. 517.
(*z*) 18 Ch. D. 218.
(*a*) 18 Ch. D. 634.
(*b*) [1905] 2 Ch. 100.
(*c*) This, no doubt, is not generally the sole effect of vesting; it also gives the intermediate income: but here the income was expressly disposed of.
(*d*) 49 L. J. Ch. 744; [1880] W. N. 136. See also *Re Teale*, 53 L. T. 936.

or their respective parents would have taken and been entitled to if living, share and share alike." It was held by Sir C. Hall, V.-C., that the gift over was so ill-constructed, and (particularly with regard to the daughter's share) so embarrassing, that he could not give effect to it. He considered it unnecessary to say whether he agreed with *Johnson* v. *Crook*: he distinguished that case on the ground that what was there given over was not the whole share, but such part or parts thereof as should not have been received.

With regard to the distinction which depends on the words specially referring to an unreceived part—to hold that, unless there are such words, the gift over will not carry such part, where other part has been received, and still more, that unless there are such words the gift over is void *ab initio*, would seem to push to an extreme point the doctrine that a clear vested gift is not to be cut down by subsequent ambiguous expressions (*e*).

There is, however, another distinction between *Crook* v. *Johnson* and the other cases, *viz.*, that the testator had shown that he intended the legatee to take the risk of the non-receipt being caused by the misconduct of the trustee. Where this is not shown, the further question, whether the Court can inquire into the possibility of an earlier receipt—an inquiry which is needed to protect the legatee from misconduct in the trustee—must, it should seem (having regard to Lord Eldon's opinion that such misconduct shall not affect third persons), enter largely into the consideration of the main question, whether the clause is itself valid. In this way *Hutcheon* v. *Mannington* would have a material bearing on that question, and the Court would have to decide whether in ordinary cases it would follow that authority or the opinion of Lord Eldon, Sir J. Leach and Sir G. Turner.

Gift over if A dies without *leaving* children, object of prior vested gift, read without *having*.

(6) *Death without "leaving" Issue.*—It has been noticed in a former chapter (*f*) that where property is given to one for life, and after his death to his children, with a gift over if he dies without *leaving* children, the gift over is sometimes construed as meaning in default of objects of the prior gift, or, as it is commonly expressed, "leaving" is construed "having." The same principle of construction applies where the gift is to a person for life and after his death to his children (or issue), with a gift over in the event of his death without leaving issue (*g*). But it

(*e*) As to the distributive construction of a clause of forfeiture, see *per* Jessel, M.R., *Re Roberts*, 19 Ch. D., at p. 528.

(*f*) Chap. XLII, *ante*, p. 1694.

(*g*) *Treharne* v. *Layton*, L. R. 10 Q. B. 459; *Re Brown's Trust*, L. R. 16 Eq. 239; *Barkworth* v. *Barkworth*, 75 L. J. Ch. 754; *Re Bradbury*, 90 L. T. 824. As to *Ex p. Hooper*, 1 Drew. 264, see p. 1927, n. (*z*).

does not apply where there is no ambiguity in the testator's language (*h*), and, of course, it does not apply where there is no gift to the issue (*i*).

(*h*) As in *Young* v. *Turner*, 1 B. & S. 550 ("without leaving any issue at the time of her decease"), *ante*, p. 1700.

(*i*) *White* v. *Hight*, 12 Ch. D. 751, which is contra, was overruled by *Re Ball*, 59 L. T. 800; *ante*, p. 1701 n. (*r*).

CHAPTER LVIII.

EFFECT OF FAILURE OF A PRIOR GIFT ON AN ULTERIOR EXECUTORY OR SUBSTITUTED GIFT OF THE SAME SUBJECT; ALSO THE CONVERSE CASE.

Effect upon executory gift of failure of prior gift.

Mr. Jarman remarks (*a*): "Where real or personal estate is given to a person for life, with an ulterior gift to B, as the gift to B is absolutely vested, and takes effect in possession whenever the prior gift ceases or fails, (in whatever manner,) the question discussed in the present chapter cannot arise thereon.

"Sometimes, however, an executory gift is made to take effect in defeasance of a prior gift, *i.e.*, to arise on an event which determines the interest of the prior devisee or legatee, and it happens that the prior gift fails *ab initio*, either by reason of its object (if non-existing at the date of the will) never coming into existence, or by reason of such object (if a person *in esse*) dying in the testator's lifetime. It then becomes a question whether the executory gift takes effect, the testator not having in terms provided for the event which has happened, although there cannot be a shadow of doubt that, if asked whether, in case of the prior gift failing altogether for want of an object, he meant the ulterior gift to take effect, his answer would have been in the affirmative. The conclusion that such was the actual intention has been deemed to amount to what the law denominates a necessary implication. Thus, in the well-known case of *Jones* v. *Westcomb* (*b*), where a testator bequeathed a term of years to his wife for life, and after her death to the child she was then (*i.e.*, at the making of the will) enceinte with; and if such child should die before the age of twenty-one, then one-third part to his wife, and the other two-third parts to other persons. The wife was not enceinte; nevertheless Lord Harcourt held, that the bequests over took effect; and the Court of King's Bench (*c*), on two several occasions (in opposition to a contrary determination of the Common Pleas (*d*)), came to a similar conclusion on the same will.

Jones v. *Westcomb.*

(*a*) First ed. Vol. II, p. 702.

(*b*) Pre Ch. 316; 1 Eq. Ca. Ab. 245, pl. 10, Gilb. Rep. 74, following *Curius* and *Coponius*, Cicero de Oratore, lib. 1, c. 39; Pro Caecina c. 18; also stated 4 K. & J., p. 610, and see *Frogmorton* v. *Holyday*, 3 Burr. 1618.

(*c*) *Andrews* v. *Fulham*, 2 Stra. 1092; *Gulliver* v. *Wickett*, 1 Wils. 105; *Doe* v. *Challis*, 18 Q. B. 224, affirmed in D. P. 7 H. L. C. 531 (*Evers* v. *Challis*); *Watson* v. *Young*, 28 Ch. D. 436. But the one event cannot be construed as included in the other, where the will elsewhere expressly provides for it, *Swayne* v. *Smith*, 1 S. & St. 56.

(*d*) See *Roe* d. *Fulham* v. *Wickett*, Willes, 303, 311.

Failure of prior gift held to let in ulterior gift.

"So, in *Statham* v. *Bell* (*e*), where a testator, reciting that his wife was pregnant, devised that if she brought forth a son, then that he should inherit his estate; but if a daughter, then one moiety to his wife, and the other to his two daughters (he had one daughter then living) at twenty-one. If either died before that time, the survivor to have her sister's share; *if both died before that time*, then both shares to his wife and her heirs. The wife was not enceinte; and the other daughter dying under twenty-one, the wife was held to be entitled to the whole.

"It would be immaterial in such case whether the wife had or had not an after-born child subsequent in procreation as well as birth, as such child would not be an object of the gift to the child with which the wife was then enceinte (*f*).

"So, in the case of *Meadows* v. *Parry* (*g*), where a testator bequeathed the residue of his estate to trustees, upon trust to apply the dividends and interest for the maintenance of all such children as he should happen to leave at his death, and born in due time after, equally, until the age of twenty-one, and then to transfer the funds to them; and in case any of the children should die before twenty-one, such deceased child's share to go to the survivors; and if there should be only one child who should attain that age, upon trust to pay the residue to such child: *and in case all the children should die before attaining that age*, then he bequeathed the residue to his wife. The testator died without leaving, or ever having had, any issue; but Sir W. Grant, M.R., held, that the bequest to the wife took effect.

Gift over, in case there be but one child, extended by implication to event of there not being any.

"And, upon the same principle, a bequest over in the event of the prior legatee having but one child has been held to extend by implication to the event of her not having any child. Thus, in the case of *Murray* v. *Jones* (*h*), where a testatrix, after bequeathing the residue of her personal property to her daughters and younger sons, provided that in case she should have but one child living at the time of her decease, or in case she should have two or more sons and no daughter or daughters living at the time of her decease, and all of them but one should depart this life under the age of twenty-one years, or in case she should have two or more daughters and no son or sons living at the time of her decease, and all of them but one should depart this life under

(*e*) Cowp. 40.

(*f*) *Foster* v. *Cook*, 3 B. C. C. 347.

(*g*) 1 V. & B. 124. *Jones* v. *Westcomb* and *Meadows* v. *Parry* were followed in *Moore* v. *Beagley*, 33 L. T. 198. See also *Fonnereau* v. *Fonnereau*, 3 Atk. 315; *Earl of Newburgh* v. *Eyre*, 4 Russ. 454, where a question of this nature arose under a special will and was much discussed; *Osborn* v. *Bellman*, 2 Gif. 593, where this construction was made on a marriage settlement.

(*h*) 2 V. & B. 313. See also *Aiton* v. *Brooks*, 7 Sim. 204, *ante*, p. 2036; and *Wilkinson* v. *Thornhill*, 61 L. T. 362 (settlement).

twenty-one, and without having been married; or in case she should have both sons and daughters, and all but one, being a son, should die under twenty-one, or being a daughter under that age and unmarried, then she bequeathed the property to another family. The testatrix died without having had a child; but Sir W. Grant, M.R., held that the ulterior gift nevertheless arose; his opinion being, that the case put by the testatrix, namely, that of her having but one child, did not contain a condition that she should have one child living at that time. His reasoning well deserves a particular statement. "At first sight," said the M.R., "a proposition relative to having but one child may seem to include in it and to imply the having one. That is true, if the proposition be affirmative; but by no means so, if the proposition be hypothetical or conditional. The proposition that A has but one child, is as much an assertion that he has one as that he has no more than one; but when the having but one is made the condition on which some particular consequence is to depend, the existence of one is not required for the fulfilment of the condition, unless the consequence be relative to that one supposed child. As, if I say that, in case I have but one child, it shall have a certain portion, it is in the nature of the thing necessary that the child should exist to be entitled to the portion; but if I say, that, in case I shall have but one child of my own, I will make a provision for the children of my brother, it is quite clear that my having one child is no part of the condition on which the supposed consequence is to depend. My having one child of my own would be rather an obstacle than an inducement to the making a provision for the children of another person. The case I guard against is the having a plurality of children; and it is only the existence of two or more that can constitute a failure of the condition on which the intended provision of my brother's children was to depend. The plain sense of the proposition is, that unless I have more than one the provision shall be made."

Sir William Grant's reasoning in *Murray* v. *Jones*.

"Again, in the case of *Mackinnon* v. *Sewell* (*i*), where the testatrix bequeathed her residue in trust for her daughter Caroline for life, and after her death for her daughter's daughter, if she should survive her mother and attain twenty-one; but in case she should not survive such mother and attain twenty-one, then in trust for such other child or children of the testatrix's daughter as should be living at their mother's death, to be paid to them after her death as they attained twenty-one; and if all

Gift over extended by implication to event not falling within terms of will.

(*i*) 5 Sim. 78, affirmed 2 My. & K. 202. See also *Wilson* v. *Mount*, 2 Bea. 397; *Tennant* v. *Heathfield*, 21 Bea. 255; *Brock* v. *Bradley*, 33 Bea. 670 (gift over contingently on legatee marrying); *Davies* v. *Davies*, 30 W. R. 918; and the recent case of *Re Mason*, 54 Sol. J. 425.

such other children of the testatrix's daughter *should die before attaining twenty-one*, then in trust for M. The granddaughter attained twenty-one, but did not survive her mother. Another child of the testatrix's daughter attained twenty-one, but did not survive her mother: afterwards the daughter died. Sir L. Shadwell, V.-C., on the authority of the preceding cases, held, that the bequest over to M. took effect; his Honour considering that the bequest over, in the event of the children that might survive the mother not attaining the age of twenty-one, was but equivalent to a bequest over in the event of there being no child who should survive the mother and attain twenty-one.

Gift over on prior devisee's refusal to do a certain act. Effect of prior devisee not coming into existence, on gift over if he refuse to do a certain act.

"On the principle of the preceding cases, it could not be doubted that an executory gift made to take effect on the prior devisee's neglect or refusal to accept the devise (*k*) or perform some other prescribed act, would take effect, notwithstanding the object of the prior gift never happens to come into existence, such a contingency being implied and virtually contained in the event described. For, (to proceed to the second class of cases before referred to,) it has been decided that where a testator gives real or personal property to A, and in case of his neglect or failure to perform a prescribed act within a definite period after his (the testator's) decease, then to B, and it happens that the prior devisee or legatee dies *in the testator's lifetime*, the gift over to B takes effect.

Death of prior devisee held to let in ulterior devisee.

"Thus, in the case of *Avelyn* v. *Ward* (*l*), where a testator devised his real estate to his brother A and his heirs on this express condition, that he should, within three months after the testator's decease, execute and deliver to his trustee a general release of all demands on his estate; *but if A should neglect to give such release*, the devise to him to be null and void, and in such case the testator devised to W., his heirs and assigns, for ever. A died in the testator's lifetime. Lord Hardwicke held that the gift over took effect; observing that he knew of no case of a remainder or conditional limitation over of a real estate, whether by way of a particular estate, so as to leave a proper remainder, or to defeat an absolute fee before by a conditional limitation, *but if the precedent limitation by what means soever is out of the case, the subsequent limitation takes place.*"

Prior devise falling under the Mortmain Act.

And this doctrine is applicable to the case of a devise to a charity, which is void by law, with a gift over in the event of the inhabitants not appointing a committee or not being willing to

(*k*) See *Scatterwood* v. *Edge*, 1 Salk. 229.

(*l*) 1 Ves. sen. 420. See also *Doe* d. *Wells* v. *Scott*, 3 M. & Sel. 300, *ante*, p. 1334 n. (*b*); *Re Betts*, 30 L. J. Prob. 167.

carry out the scheme; whether the committee was appointed or not being held to be immaterial. This was decided by Sir W. P. Wood, V.-C., in *Warren* v. *Rudall* (*m*), in opposition to *Att.-Gen.* v. *Hodgson* (*n*), and *Philpott* v. *St. George's Hospital* (*o*). "I cannot," he said, "see any substantial distinction between the cases to which I have referred of a devise over after a devise to a nonentity, if the nonentity should die under age, or again, of a devise over, after a devise to a deceased person, if the deceased person should fail to do a certain act, and the case before me of a devise to a charity which cannot take, followed by a devise over in the event of that charity which cannot take omitting to perform a certain act." This decision was affirmed in the House of Lords. Lord Cranworth indeed, though inclined to admit the applicability of the doctrine, relied on the fact that no committee had been appointed, so that the contingency on which the gift over was limited had literally happened. But Lord Campbell and Lord Kingsdown agreed with the more general reasoning of the V.-C. (*p*).

Remarks on *Avelyn* v. *Ward*.

Mr. Jarman goes on to point out (*q*) that Lord Hardwicke's observation in *Avelyn* v. *Ward*, quoted above, "is not to be taken in too extensive a sense; for it is clear, according to subsequent cases, that if the event upon which the prior gift is made defeasible, and the subsequent gift to take effect, is one which may happen as well in the lifetime of the testator as afterwards (in which respect such case obviously stands distinguished from those just stated), and the events which happen are such as would, if the first devisee had survived the testator, have vested the property absolutely in him, the lapse of such prior devise by the death of the devisee in the testator's lifetime, *though it removes the prior gift out of the way*, does not let in the substituted or executory devise, which was to take effect on the happening of the alternative or opposite event.

Effect where prior gift fails by lapse.

"Thus, in *Calthorpe* v. *Gough* (*r*), where a legacy of £10,000 was given to trustees, in trust for Lady Gough for life; and, in

(*m*) 4 K. & J. 603; 9 H. L. C. 420 (*Hall* v. *Warren*).
(*n*) 15 Sim. 146.
(*o*) 21 Beav. 134.
(*p*) The V.-C. retained his opinion; see *Re Smith's Trusts*, L. R. 1 Eq. at p. 83. In *Re Stringer's Estate*, (6 Ch. D. 1, *ante*, p. 540), the foregoing cases were cited as authorities for the position that, where property is given absolutely, with a gift over if the devisee dies without disposing of it, the gift over, which is clearly void for repugnancy if the devisee survives the testator, is valid if he dies before him. Jessel, M.R., "declined to accede to such a doctrine," and rejected the claim of the devisee over. On appeal, James, L.J., expressed great doubt whether the gift over was not valid in the event which had happened, *viz.*, the lapse of the prior gift. Being valid (if at all) only on this ground, it is clearly not within the authorities here discussed.
(*q*) First ed. Vol. II, p. 707.
(*r*) Cit. 3 B. C. C. 395; *Re Graham*, [1929] 2 Ch. 127.

case she should die in the lifetime of her husband, as she should appoint; and, in default of appointment, to her children; *but if Lady G. should survive her husband, then for her absolutely.* Lady Gough survived her husband, but died in the lifetime of the testator. The M.R. held the legacy to be lapsed, and that the children were not entitled.

"So, in *Doo* v. *Brabant* (*s*), a legacy was bequeathed in trust for A until she attained twenty-one, and then [to transfer it to A,] her executors and administrators; and in case A should die *under the age of twenty-one years*, leaving any child or children of her body lawfully begotten, then in trust for such child or children; but in case A should die under twenty-one without leaving any child or children, then over. A attained twenty-one, and died in the lifetime of the testator, leaving children"; and Lord Thurlow was strongly inclined to decide in their favour but for the case of *Calthorpe* v. *Gough*. But on a case stated for the Court of King's Bench, that Court certified that the legacy lapsed, and the Lords Commissioners decided accordingly.

"Again, in the case of *Williams* v. *Chitty* (*t*), where the testator devised in trust for and to the use of his daughter Sarah, her heirs and assigns; *but in case of her decease under twenty-one and unmarried*, in trust, and to the use of his daughter Elizabeth, her heirs and assigns. Sarah died in the lifetime of the testator under age, but having been married. One question was, whether in the event which had happened, the devise over to Elizabeth was good. Her counsel considered her claim to be so obviously untenable, that he gave up the point; and Lord Loughborough seems to have entertained a similar opinion (*u*).

"In the three preceding cases, it will be observed, the devise or bequest which lapsed was in favour of a designated individual; but in the next case (*x*) we have an example of the application of the principle to a case of more doubtful complexion, the gift being in favour of *a class*.

Tarbuck v. Tarbuck.

"The devise, in substance, was to A for life, remainder to his children in fee; and, if he should die without leaving issue, then over. A died in the testator's lifetime, leaving a son, who also

(*s*) 3 B. C. C. 393; 4 T. R. 706; *Re Graham*, [1929] 2 Ch. 127; and see *Lomas* v. *Wright*, 2 My. & K., at p. 775.

(*t*) 3 Ves. 545. See also *Miller* v. *Faure*, 1 Ves. Sen. 85; *Humberstone* v. *Stanton*, 1 V. & B. 385; *Williams* v. *Jones*, 1 Russ. 517; *Underwood* v. *Wing*, 4 D. M. & G., at p. 661; 8 H. L. C. 183 (*Wing* v. *Angrave*); *Cox* v. *Parker*, 25 L. J. Ch. 873, the report of which 22 Bea. 168 omits the important statement that William Michael Parker attained twenty-one; also *per* Wood, V.-C., *Re Sander's Trusts*, L. R. 1 Eq., at p. 681.

(*u*) The case of *M'Carthy* v. *M'Carthy*, 1 L. R., Ir. R. 189, 3 *ib.* 317, seems to have been decided on the principle suggested by Mr. Jarman. In that case the prior gift failed because the devisee was an attesting witness.

(*x*) *Tarbuck* v. *Tarbuck*, 4 L. J. (N.S.) Ch. 129, stated more fully, *ante*, p. 1926.

died in the testator's lifetime : and Sir C. C. Pepys, M.R., held, that under these circumstances the devise over failed; observing that it was clear that, if A's son had survived the testator, the devise over could not have taken effect; and it was, he thought, established by authority that the situation of the parties was not altered by the fact of the prior devisee having died before the testator.

Remark on *Tarbuck* v. *Tarbuck*.

"This is an important extension of the doctrine; for, as a devise to a fluctuating class, as children, operates in favour of such of them only as are living at the testator's decease, there might seem to be ground to contend, that, in effect, the case was one in which the failure of the gift was owing to the fact of no object having come into existence rather than to lapse." The principle of *Tarbuck* v. *Tarbuck* was, however, affirmed in *Brookman* v. *Smith* (*y*), where the devise was to A for life, with remainder to the children of A in fee, and with a gift over "in case every child born or to be born should die under twenty-one" : A had a child living at the date of the will who attained twenty-one, but died before the testator; and it was held that the gift over failed. Some of the Judges relied on the expression "*born* or to be born" as necessarily referring to the child then living; but Blackburn, J., doubted whether this was not giving it too much importance; and it is plain that, though there had been no such words, and whatever might have been their opinion if *Tarbuck* v. *Tarbuck* had not decided the point, the Court would have declined to overrule that case.

"It is presumed, however, that, if the gift had been *in terms* to such children as should be living at the testator's decease, the result would have been different, as the failure of the devise would then clearly have been the consequence, not of lapse merely, but of the non-happening of the contingency on which the gift was made contingent, and therefore the gift over would take effect (*z*).

Remark on preceding cases.

"It is proper to apprise the reader, that the distinction which has been suggested as reconciling the construction adopted in the last four cases (*a*) with that which prevailed in *Jones* v. *Westcomb* and *Avelyn* v. *Ward*, was not adopted or recognised as the ground of decision in those cases. On the contrary, Lord

(*y*) L. R. 6 Ex. 291; 7 Ex. 271. In *Tarbuck* v. *Tarbuck*, "leaving" was construed literally, *i.e.*, the failure of children was there, as well as in *Brookman* v. *Smith*, coupled in precise terms to a period having no reference to the testator's death. Such a case seems not necessarily to govern one where (as in *Maitland* v. *Chalie*, etc., *ante*, p. 1699) "die without leaving children" means simply failure of the preceding gift. See *Doe* v. *Duesbury*, *ante*, p. 1926.

(*z*) See *Shergold* v. *Boone*, 13 Ves. 370, *ante*, p. 2092.

(*a*) Namely, *Calthorpe* v. *Gough*, *Doo* v. *Brabant*, *Williams* v. *Chitty*, and *Tarbuck* v. *Tarbuck*.

Thurlow, in *Doo* v. *Brabant* treated *Calthorpe* v. *Gough* (on the authority of which he decided the former case) as inconsistent with and as overruling the line of cases in question. In support of the writer's suggested distinction, however, it is to be observed that the cases of *Calthorpe* v. *Gough* and *Doo* v. *Brabant* have been since followed as well in *Williams* v. *Chitty*, already stated, as in the subsequent case of *Humberstone* v. *Stanton* (*b*), without any denial of the authority of *Jones* v. *Westcomb* and *Avelyn* v. *Ward*, while, on the other hand, the principle of *Jones* v. *Westcomb*, and more especially that of *Avelyn* v. *Ward*, has been fully recognised in the case of *Doe d. Wells* v. *Scott*" (*c*), already stated, and other cases (*d*).

But it is necessary to find an intention on the part of the testator that the gift over is to take effect in a manner different from that pointed out by the mere grammatical meaning of the words. Thus, in *Re Tredwell* (*e*), a testator gave the income of a fund to his wife during life or widowhood, and on her marriage he gave an annuity of £2,000 per annum to his wife, and directed the payment of various legacies after the death of his wife. It was contended that on the remarriage of the widow these legacies became immediately payable, but the Court of Appeal could find no grounds for supposing that the intention of the testator differed from the plain words of the will.

Re Tredwell.

Re Lang.

In *Re Lang* (*f*), the testator gave out of the income of his residuary estate an annuity to his wife for life and an annuity to his sister M., provided she should be a widow at his death, until her remarriage or the death of his wife. He then directed the surplus income to be accumulated and that the accumulations should be applied as part of his residuary estate, and that on his wife's death the trustees should set apart certain legacies, including £1,000 to M., provided she should be a widow at the testator's wife's death, but in the event of M. then being a wife, in trust for her children equally. The ultimate residue after payment of these and other legacies were to be held in trust for such of certain named persons, including J. and M., as should be living at the death of the testator's wife, with a proviso that J.'s share in the residue was subject to his being, and only to be paid if he should be, a widower at the death of the testator's wife, and that the share of M. was subject to her being, and only

(*b*) 1 V. & B. 385.
(*c*) 3 M. & Sel. 300, *ante*, p. 1334.
(*d*) See 4 K. & J. 603; 9 H. L. C. 420.
(*e*) [1891] 2 Ch. 640, see particularly Kay, L.J.'s judgment. That this case in no way infringes the principle of *Jones* v. *Westcomb* seems clear from *Re Akeroyd's Settlement*, [1893] 3 Ch. 363. See also *Re Shuckburgh's Settlement*, [1901] 2 Ch. 794.
(*f*) [1912] 2 Ch. 386.

to be paid to her if she should be, a widow at the death of the testator's wife, and that the share of S., if not a widower, and the share of M., if not a widow, at the death of the testator's wife should go to D. and F., children of M. M. died before the testator's wife without having remarried. J. and his wife and D. and F. all survived the testator's wife. Parker, J., held (distinguishing *Davies* v. *Davies* (*g*) and *Brock* v. *Bradley* (*h*)), (1) that S.'s share of residue went to D. and F.; (2) that M.'s share of residue did not go to D. and F., as she was dead at the death of the testator's wife; and (3) that the legacy of £1,000 to M. failed, as it was contingent on his being alive at the death of the testator's wife.

Mr. Jarman continues (*i*): "There is, it is submitted, a solid difference between sustaining a devise which is to take effect in the event of a person not *in esse* dying under a certain age, though such person never come into existence, and holding it to take effect in the event of his being born and dying *above* that age in the lifetime of the testator. In the former case, the contingency of no such person coming *in esse* may be considered as included and implied in the contingency expressed; but, in the latter, the event to which it would be applied is the exact opposite or alternative of that on which the substituted gift is dependent (*k*). To let in the ulterior devise in such case would be to give the estate to one, in the very event in which the testator has declared that it shall go to another, whose incapacity, by reason of death, to take, seems to form no solid ground for changing its object. In the event which has happened, the lapsed devise must be read as an absolute gift.

Effect upon prior gift, of failure of executory gift.

"The same principles which determine the effect upon a posterior or executory gift, of the failure of a prior gift, apply also to the converse case, namely, that of the failure of an ulterior or executory gift, and the consequence of such failure on the prior gift. According to these principles, if lands are devised to A and his heirs, and in case he shall die without issue living at his decease, then to B and his heirs, and B dies in the testator's lifetime, and afterwards A dies accordingly without issue, having survived the testator; the event having happened upon which the ulterior devise would have taken effect, and that devise having failed by lapse in the testator's lifetime, the title of the heir is let in; or (if the will be regulated by the new law)

(*g*) 30 W. R. 918.
(*h*) 33 Bea. 670.
(*i*) First ed. Vol. II, p. 710.
(*k*) If the event on which the substituted gift depends actually happens in the testator's lifetime, the substituted gift takes effect, *ante*, p. 2089. There is a dictum in *Greated* v. *Greated*, 26 Bea., pp. 628, 629, apparently *contra*: *sed qu.*

then the title of the residuary devisee, the effect being precisely the same, in the events which have happend, as if the ulterior devise had been a simple absolute devise in fee (*l*). On the other hand, if the devise were to A and his heirs, and if he should die without leaving issue at his decease, then to B for life, with remainder to his children in fee, and A, having survived the testator, dies without leaving issue, and B also dies without having had a child (whether such event happens in the testator's lifetime or after his decease), the devise to A becomes absolute and indefeasible, by the removal out of the way of the executory devise engrafted thereon; such devise having failed (not by lapse, as in the former case, but) by the failure of the event on which it was made dependent (*m*). If B had had a child, and such child had died in the testator's lifetime, the case would, it should seem, according to the principle of the case of *Tarbuck* v. *Tarbuck* (*n*), have become assimilated, to the case first stated.

"The difference then, in short, is between a failure of the posterior gift by lapse, letting in the title of the heir or residuary devisee (as the case may be), and a failure in event, of which the prior devisee has the benefit."

(*l*) See *O'Mahoney* v. *Burdett*, L. R. 7 H. L., pp. 388, 407 (legacy).
(*m*) *Jackson* v. *Noble*, 2 Kee. 590. As to this case see p. 1408 n. (*q*).
(*n*) *Ante*, p. 2137.

CHAPTER LIX.

GENERAL RULES OF CONSTRUCTION.

General rules of construction.

"THERE are," as Mr. Jarman points out (*a*), "certain rules of construction common to both deeds and wills; but as, in the disposition of property by deed, an adherence to settled forms of expression is either rigidly exacted by the Courts, or maintained by the practice of the profession, the rules to which the construction of deeds has given rise are comparatively few and simple. But the peculiar indulgence extended to testators, who are regarded as *inopes consilii*, has exempted the language of wills from all technical restraint, and withdrawn them in some degree from professional influence. By throwing down these barriers, a wide field is laid open to the caprices of language; though, at certain points, we have seen, its limits are ascertained by rules sufficiently definite, and we are guided through its least beaten tracks by general principles.

"It has been a subject of regret with eminent Judges (*b*), that wills were not subjected to the same strict rules of construction as deeds, since the relaxation of those rules introduced so much uncertainty and litigation; and was, indeed, at an early period, productive of so much embarrassment as to draw from Lord Coke (*c*) the observation, that 'wills, and the construction of them, do more perplex a man than any other learning; and, to make a certain construction of them, this *excedit jurisprudentum artem*. But, (he adds,) I have learned this good rule, always to judge in such cases, as near as may be, and according to the rules of law.'

"This quotation will serve to introduce the observation, that, though the intention of testators, when ascertained, is implicitly obeyed, however informal the language in which it may have been conveyed; yet the Courts, in construing that language, resort to certain established rules, by which particular words and expressions, standing unexplained, have obtained a definite meaning; which meaning, it must be confessed, does not always quadrate with their popular acceptation. This results from the intendment of law, which presumes every person to be acquainted

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(*a*) First ed. Vol. II, p. 737.

(*b*) See Lord Kenyon's judgment in *Denn* d. *Moor* v. *Mellor*, 5 T. R., at p. 561; *Doe* v. *Allen*, 8 *ib.*, at p. 502. See also Wilm. 398.

(*c*) 2 Bulst. 130.

with its rules of interpretation (*d*), and consequently to use expressions in their legal sense,—*i.e.*, in the sense which has been affixed by adjudication to the same expressions occurring under analogous circumstances : a presumption which, though it may sometimes have disappointed the intention of testators, is fraught with great general convenience; for, without some acknowledged standard of interpretation, it would have been impossible to rely with confidence on the operation of any will not technically expressed, until it had received a judicial interpretation. And, indeed, dispositions conceived in the most appropriate forms of expression, must have been rendered precarious by a licence of construction which set up the intention, to be collected upon arbitrary notions, as paramount to the authority of cases and principles. In such a state of things, the most elaborate treatise on the construction of wills, though it might, perhaps, like other curious researches, prove interesting to some inquirers into the wisdom and sagacity of our ancestors, could contribute little or nothing towards placing the law of property, as it regards testamentary dispositions, on a secure and solid foundation. It is, therefore, necessary, to remind the reader, that the language of the Courts, when they speak of the intention as the governing principle, sometimes calling it 'the law' of the instrument (*e*), sometimes the 'pole star' (*f*), sometimes the 'sovereign guide' (*g*), must always be understood with this important limitation—that here, as in other instances, the Judges submit to be bound by precedents and authorities in point; and endeavour, as we have seen, to collect the intention upon grounds of a judicial nature, as distinguished from arbitrary occasional conjecture (*h*).

(*d*) See *Doe* d. *Lyde* v. *Lyde*, 1 T. R., at p. 596; *Langham* v. *Sanford*, 2 Mer., at p. 22. But see Lord Thurlow's judgment in *Jones* v. *Morgan*, 1 B. C. C., at p. 221; and Lord Alvanley's observations in *Seale* v. *Barter*, 2 B. & P., at p. 494.

(*e*) *Per* Lord Hale, in *King* v. *Melling*, 1 Vent., at p. 231.

(*f*) *Per* Wilmot, C.J., in *Doe* d. *Long* v. *Laming*, 2 Burr., at p. 1112.

(*g*) *Per* Wilmot, C.J., in *Roe* d. *Dodson* v. *Grew*, 2 Wils. 322.

(*h*) "This intention must be discovered from the words of the will itself, and not from extrinsic circumstances; and the Court must proceed upon known principles and established rules, not on loose conjectural interpretations or by considering what a man may be imagined to do in the testator's circumstances" : *per* Henley, L. K. (1st ed.), at p. 43. "As regards our duty when wills come before us for construction, it is obvious to say that it is in each case to consider the words of the will. I say that, for the purpose of calling attention to the argument that in the absence of any rule of law laid down or established by cases, we are at liberty to construe wills as ordinary intelligent persons would do. There is a fallacy in this. We are bound to have regard to any rules of construction which have been established by the Courts, and subject to that we are bound to construe the will as trained legal minds would do. Even very intelligent persons whose minds are not so trained are accustomed to jump at a conclusion as to what a person means by considering what they, under similar circumstances, think they would have done. That is conjecture only, and conjecture on an imperfect knowledge of the circum-

"The result, upon the whole, has been satisfactory; for, by the application of established rules of construction, with due attention to particular circumstances, a degree of certainty has been attained, which must have been looked for in vain, if less regard had been paid to the principles of anterior decisions. And, though the cases on the construction of wills have become, by the accumulation of more than three centuries, immensely numerous; yet when we consider the vast augmentation which, during this period, and the last century in particular, has taken place in the wealth and population of the country; the several new species of property, which the ever-varying exigencies of a commercial nation have from time to time called into existence, and to which the rules of construction were to be applied; the complexity which a more refined and artificial state of society has introduced into dispositions of property; and lastly, the more extensive use of the art of writing, leading to increased facility in the exercise of the testamentary power—we are prepared to expect an incessantly growing accession to questions of this nature. But it will be found, I apprehend, that, so far from having increased in a corresponding ratio, they have, and particularly at a recent period, numerically diminished.

"This must be attributed partly to the more frequent practice of resorting to, and the increased facility of obtaining, professional assistance in the preparation of wills; and partly to the maturity which the system of construction has gradually attained, and which enables persons conversant with the subject, in most cases, to predicate with a considerable approach to certainty, what would be the decision of a Court of judicature in any given case; and, consequently, to render an appeal to its authority unnecessary.

"Some uncertainty, it will be admitted, is inseparable from the nature of the subject. Many of the rules of construction are such as necessarily involve uncertainty in the application of them

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stances of the case, because the facts known to the testator may not all be before them, and the testator's mind, as regards the attention to be paid to the claims of the different parties dependent upon him, may not have been constituted as their minds are constituted, so that it cannot be concluded that he would have acted in the same way as they. We therefore must construe the will as we should construe any other document, subject to this, that in wills, if the intention is shown, it is not necessary that the technical words which are necessary in some instruments should be used for the purpose of giving effect to it." *Per* Cotton, L.J., 11 Ch. D., at p. 878. See 1 Ves. jun. p. 564; 10 H. L. C. p. 85; L. R. 6 Ch. p. 239. See also *per* Lord Blackburn, *Rhodes* v. *Rhodes*, L. R. 7 A. C., at p. 206, and *per* Cotton, L.J., *Re Bedson's Trusts*, L. R. 28 Ch. D. at p. 526; *Palmer* v. *Orpen*, [1894] 1 Ir. R. 32. But as to authority in mere verbal interpretation see 6 H. L. C. p. 108; L. R. 10 Ch. 396 n.; 4 Ch. D. p. 68; unless the words are precisely the same, 1 H. & M. p. 549; and even then authority has been said not to be absolutely binding, *per* Jessel, M.R., L. R. 23 Ch. D. p. 111.

CHAPTER LIX.

to particular cases; and, in a few instances, the rules themselves are, we have seen, yet subjects of controversy. To discuss and illustrate these rules has been the design of the writer in the preceding pages.

Summary of the rules of construction.

"It may be useful, however, in conclusion, to present to the reader a summary of the several rules of construction which have already been the subject of detailed examination.

"I. That a will of real estate, wheresoever made, and in whatever language written, is construed according to the law of England, in which the property is situate (*i*), but a will of personalty is governed by the *lex domicilii* (*k*).

"II. That technical words are not necessary to give effect to any species of disposition in a will (*l*).

"III. That the construction of a will is the same at law and in equity (*m*), the jurisdiction each being governed by the nature of the subject (*n*); though the consequences may differ, as in the instance of a contingent remainder, which is destructible in the one case and not in the other (*o*).

"IV. That a will speaks, for some purposes, from the period of execution, and for others from the death of the testator; but never operates until the latter period (*p*).

"V. That the heir is not to be disinherited without an express devise, or necessary implication (*q*); such implication importing, not natural necessity, but so strong a probability, that an intention to the contrary cannot be supposed (*r*).

"VI. That merely negative words are not sufficient to exclude the title of the heir or next-of-kin (*s*). There must be an actual gift to some other definite object.

"VII. That all the parts of a will are to be construed in relation to each other, and so as, if possible, to form one

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(*i*) Pre. Ch. 577; *ante*, p. 1.
(*k*) *Ante*, p. 5.
(*l*) 3 T. R. 86; 11 East, 246; 16 *ib*. 222.
(*m*) 3 P. W. 259; 2 Ves. 74; 4 Jur. (N.S.) 625; 27 L. J. Ch. 726.
(*n*) 1 Ves. jun. 16; 2 *ib*. 417; 4 Ves. 329.
(*o*) See as to contingent remainders, *ante*, p. 1418.
(*p*) *Vide ante*, Chap. XII.
(*q*) Br. Devise, 52; Dyer, 330 *b*; 2 Stra. 969; Ca. t. Hardw. 142; 1 Wils. 105; Willes, 309; 2 T. R. 209; 2 M. & Sel. 448. See also 3 B. P. C. Toml. 45; see p. 622. As mentioned above, p. 615 n. (*s*) this maxim had little, if any, force. A more important maxim is that when a man makes a will professing to dispose of all his property, he does not wish to die intestate as to any part of it (31 Ch. D., at p. 319). Since 1925, there is no heir to be disinherited.
(*r*) 1 V. & B. 466; 5 T. R. 558; 7 East, 97; 1 B. & P. N. R. 118; 18 Ves. 40. "There is hardly any case where an implication is of necessity, but it is called 'necessary,' because the Court finds it so to answer the intention of the devisor." *Per* Lord Hardwicke, *Coryton* v. *Helyar*, 2 Cox, at p. 348.
(*s*) *Ante*, pp. 655, 752; 4 Bea. 318; 6 Hare, 145.

consistent whole, but, where several parts are absolutely irreconcileable, the latter must prevail (*t*).

"VIII. That extrinsic evidence is not admissible to alter, detract from, or add to, the terms of a will (*u*), (though it may be used to rebut a resulting trust attaching to a legal title created by it (*x*), or to remove a latent ambiguity [arising from words equally descriptive of two or more subjects or objects of gift (*y*)]).

"IX. Nor to vary the meaning of words (*z*); and, therefore, in order to attach a strained and extraordinary sense to a particular word, an instrument executed by the testator, in which the same word occurs in that sense, is not admissible (*a*), but

"X. The Court will look at the circumstances under which the devisor makes his will—as the state of his property (*b*), of his family (*c*), and the like (*d*).

"XI. That, in general, implication is admissible only in the absence of, and not to control, an express disposition (*e*).

"XII. That an express and positive devise cannot be controlled by the reason assigned (*f*), or by subsequent ambiguous words (*g*), or by inference and argument from other parts of the will (*h*); and, accordingly, such a devise is not affected by a subsequent inaccurate recital of, or reference to, its contents (*i*); though recourse may be had to such reference to assist the construction, in case of ambiguity or doubt (*k*).

"XIII. That the inconvenience or absurdity of a devise is no ground for varying the construction, where the terms of it are unambiguous (*l*); nor is the fact, that the testator did not foresee all the consequences of his disposition, a reason for varying

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(*t*) 9 Mod. 154; 2 W. Bl. 976; 1 T. R. 630; 6 Ves. 100, 129; 16 Ves. 314; 3 M. & Sel. 158; 1 Sw. 28; 2 Atk. 372; 6 T. R. 314; 2 Taunt. 109; 18 Ves. 421; 6 Moore, 214; 6 Hare, 492; *ante*, Chap. XVII. But see Barnard, C. C. 261.

(*u*) See judgment in 16 Ves. 486; 5 Rep. 68; Cas. t. Talb. 240; 3 B. P. C. Toml. 607; 2 Ch. Cas. 231; 7 T. R. 138; *ante*, Chap. XV.

(*x*) Cas. t. Talb. 78; *ante*, p. 473.

(*y*) *Ante*, p. 488.

(*z*) 4 Taunt. 176; 4 Dow, 65; 3 M. & Sel. 171. But see 2 P. W. 135.

(*a*) 11 East, 441; *ante*, p. 465.

(*b*) 1 Mer. 646; 7 Taunt. 105; 1 B. & Ald. 550; 3 B. & Cr. 870; 1 B. C. C. 472.

(*c*) 3 B. P. C. Toml. 257; 4 Burr. 2165; 4 B. C. C. 441; 3 B. & Ald. 657; 3 Dow. 72; 3 B. & Ald. 632; 2 Moore, 302.

(*d*) See 5 M. & Wel. 367, 368. But extrinsic evidence of the state of the testator's property, etc., is not admissible to contradict a clear and unambiguous provision in the will: *ante*, p. 461.

(*e*) Dyer, 330 *b*; 8 Rep. 94; 2 Vern. 60; 1 P. W. 54; *ante*, p. 629.

(*f*) 16 Ves. 46; *ante*, p. 554.

(*g*) 2 Cl. & Fin. 22; 8 Bligh. (N.S.) 88; 4 De G. & J. 30; *ante*, p. 555.

(*h*) 1 Ves. jun. 268; 8 Ves. 42; Cowp. 99.

(*i*) Moore, 13, pl. 50; 1 And. 8; *ante*, p. 555.

(*k*) *Ante*, pp. 555, 603.

(*l*) 1 Mer. 417; 2 S. & Stu. 295; 3 D. J. & S. 553, 554; [1902] 2 Ch., at p. 70.

it (*m*): but, where the intention is obscured by conflicting expressions, it is to be sought rather in a rational and consistent, than an irrational and inconsistent purpose (*n*).

"XIV. That the rules of construction cannot be strained to bring a devise within the rules of law (*o*); but it seems that, where the will admits of two constructions, that is to be preferred which will render it valid; and therefore the Court, in one instance, adhered to the literal language of the testator, though it was highly probable that he had written a word, by mistake, for one which would have rendered the devise void (*p*).

"XV. That favour or disfavour to the object ought not to influence the construction (*q*).

"XVI. That words, in general, are to be taken in their ordinary and grammatical sense, unless a clear intention to use them in another can be collected (*r*), and that other can be ascertained; and they are, in all cases, to receive a construction which will give to every expression some effect, rather than one that will render any of the expressions inoperative (*s*); and of two modes of construction, that is to be preferred which will prevent a total intestacy (*t*).

"XVII. That, where a testator uses technical words, he is presumed to employ them in their legal sense (*u*), unless the context clearly indicates the contrary (*x*).

"XVIII. That words, occurring more than once in a will, shall be presumed to be used always in the same sense (*y*), unless a contrary intention appear by the context (*z*), or unless the words be applied to a different subject (*a*). And, on the same principle, where a testator uses an additional word or phrase, he must be presumed to have an additional meaning (*b*).

(*m*) 3 M. & Sel. 37; 1 Mer. 358.

(*n*) 4 Mad. 67. See also 3 B. C. C. 401; 1 De G. & J. 32; 3 Drew. 724; 7 H L. C. 89; 6 Ch. D. 248.

(*o*) 1 Cox, 324; 2 Mer. 389; 1 J. & W. 31; 8 Hare, 48, 186. But see 2 R. & My. 306; 2 Kee. 756; 2 Bea. 352.

(*p*) 3 Burr. 1626; 3 B. P. C. Toml. 209. See also 2 Coll. 336; L. R. 5 H. L. 548.

(*q*) See 4 Ves. 574. But see 2 V. & B. 269; and *ante*, p. 691.

(*r*) 18 Ves. 466; 4 C. B. (N.S.) 790.

(*s*) 3 Ves. 450; 7 *ib.* 458; 7 East, 272; 2 B. & Ald. 441; *ante*, p. 1624. But see 2 D. F. & J. 454; L. R. 6 H. L. 33.

(*t*) Cas. t. Talb. 161; 4 Ves. 406; 2 Mer. 386.

(*u*) Doug. 340; 6 T. R. 352; 4 Ves. 329; 5 Ves. 401; 19 C. B. (N.S.) 780; In some cases it is difficult to say what is the "technical" meaning of a word: see the observations on the decision in *Leach* v. *Jay*, 6 Ch. D. 496, *ante*, p. 926.

(*x*) Doug. 341; 3 B. C. C. 68; 5 East, 51; 2 Ba. & Be. 204; 3 Dow, 71.

(*y*) 2 Ch. Cas. 169; Doug. 268; 3 Drew. 472.

(*z*) *Ante*, p. 1575.

(*a*) 1 P. W. 663; 2 Ves. 616; 5 M. & Sel. 126; 1 V. & B. 260. But see 14 Ves. 488.

(*b*) 4 B. C. C. 15; 13 Ves. 39; 7 Taunt. 85. "The writer has heard Lord Eldon lay down the rule in these words. But see Amb. 122; 6 Ves. 300; 10 Ves. 166; 13 East, 359; 13 Ves. 476; 19 Ves. 545; 1 Mer. 20; 3 Mer. 316;—

"XIX. That words and limitations may be transposed (*c*), supplied (*d*) or rejected (*e*), where warranted by the immediate context, or the general scheme of the will; but not merely on a conjectural hypothesis of the testator's intention, however reasonable, in opposition to the plain and obvious sense of the language of the instrument (*f*).

"XX. That words which it is obvious are mis-written, (as dying *with* issue, for dying *without* issue,) may be corrected (*g*).

"XXI. That the construction is not to be varied by events subsequent to the execution (*h*); but the Courts, in determining the meaning of particular expressions, will look to possible circumstances, in which they *might* have been called upon to affix a signification to them (*i*).

"XXII. That several independent devises, not grammatically connected, or united by the expression of a common purpose, must be construed separately, and without relation to each other; although it may be conjectured, from similarity of relationship, or other such circumstances, that the testator had the same intention in regard to both (*k*). There must be an apparent design to connect them (*l*).

"XXIII. That where a testator's intention cannot operate to its full extent, it shall take effect as far as possible (*m*).

"XXIV. That a testator is rather to be presumed to calculate on the dispositions in his will taking effect, than the contrary; and, accordingly, a provision for the death of devisees will not be considered as intended to provide exclusively for lapse, if it admits of any other construction" (*n*).

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where the argument that the testator, notwithstanding some variation of expression, had the same intention in several instances, prevailed." (Note by Mr. Jarman).

(*c*) 2 Ch. Ca. 10; Hob. 75; 2 Ves. 32; Amb. 374; 8 East, 149; 15 East, 309; 1 B. & Ald. 137; *ante*, p. 570. But see 2 Ves. 248.

(*d*) Cro. Car. 185; 7 T. R. 437; 6 East, 486; 2 D. & Ry. 398. See also 2 Bl. 1014; and *ante*, p. 556.

(*e*) 2 Ves. 277; 3 T. R. 87, n.; 3 *ib*. 484; 4 Ves. 51; 5 Ves. 243; 6 Ves. 129; 12 East, 515; 9 Ves. 566; and *ante*, p. 550.

(*f*) 18 Ves. 368; 19 *ib*. 652; 2 Mer. 25.

(*g*) 8 Mod. 59; 5 B. & Ald. 621; 3 Ad. & El. 340; 2 D. M. & G. 300.

(*h*) Cas. t. Talb. 21; 3 P. W. 259; 11 East, 558, n.; 1 Cox, 324; 1 Ves. jun. 475. But see Mr. Jarman's observations on the rule in *Wild's Case*, p. 1866.

(*i*) 11 Ves. 457; 6 Ves. 133.

(*k*) Cro. Car. 368; Doug. 759; 8 T. R. 64; 1 B. & P. N. R. 335; 9 East, 267; 11 *ib*. 220; 14 Ves. 364; 4 M. & Sel. 58; 1 Pri. 353; 4 B. & Cr. 667. See also Godb. 146.

(*l*) Leon. 57; Cas. t. Hardw. 143; 10 East. 503. This and the former class of cases chiefly relate to a question of frequent occurrence: whether words of limitation, preceded by several devises, relate to more than one of those devises. The statement of the rule in the text was cited with approval by Chitty, J., in *Re Johnston*, L. R. 26 Ch. D., at p. 545.

(*m*) Finch. 139. See also 4 Ves. 325; 13 Ves. 486.

(*n*) 2 Atk. 375; 4 Ves. 418; 4 Ves. 554; 7 Ves. 286; 1 V. & B. 422; 1 Pri. 264. See also 1 Sw. 161; 2 Ves. jun. 501; M'Clel. 168.

APPENDIX A.

SUGGESTIONS TO PERSONS TAKING INSTRUCTIONS FOR WILLS (*a*).

"FEW of the duties which devolve upon a solicitor, more imperatively call for the exercise of a sound, discriminating, and well-informed judgment, than that of taking instructions for wills. It frequently happens, that, from a want of familiar acquaintance with the subject, or from the physical weakness induced by disease, (where the testamentary act has been, as it too often is, unwisely deferred until the event which is to call it into operation seems to be impending,) testators are incapable of giving more than a general or imperfect outline of their intention, leaving the particular provisions to the discretion of their professional adviser. Indeed, some testators sit down to this task with so few ideas upon the subject, that they require to be informed of the ordinary modes of disposition under similar circumstances of family and property, with the advantages and disadvantages of each; and their judgment in the selection of one of these modes, is necessarily influenced by, if not wholly dependent on, professional recommendation. To a want of complete and accurate information as to the consequences of their proposed schemes, must be ascribed many of the absurd and inconvenient provisions introduced into testamentary gifts; to say nothing of the obscurities and inconsistencies which frequently throw an impenetrable cloud over the testator's real intentions. It may be useful to mention some particulars on which information should be obtained in taking instructions for a will, most of the inquiries being suggested by the various classes of cases discussed at large in this work, and being framed with a view to prevent such questions as those cases present. It will be obvious, that the nature of the inquiries in every case must be greatly regulated by the situation in life and other circumstances of the testator. They may be distributed into those that relate—*first*, to the subject, and *secondly*, to the objects of testamentary disposition, including in the former some general points.

Description of lands.

"1. Where lands specifically devised are described by their

(*a*) These suggestions are reprinted verbatim from the original text (Vol. II, p. 747). The fifth edition of this work (by Mr. Robbins) contained some additional "suggestions as to wills intended to operate abroad," with a summary of foreign laws relating to testamentary dispositions. These are not included in the present edition. Some information will be found in a parliamentary paper issued in 1908, entitled "Reports respecting the Limitations imposed by Law upon Testamentary Bequests in France, Germany, Italy, Russia, and the United States."

local situation and occupancy (though a reference to occupancy is in general better omitted, unless it form a necessary discriminating feature in the description), it should be carefully ascertained, that the whole of the land answering to the locality, answers also to the occupancy, or, in other words, that both parts of the description are co-extensive, to avoid any question as to the less comprehensive term being restrictive.

Immediate profits.

"2. Where there is an immediate devise to a class of persons, who may not be in existence at the death of the testator, as to the children of A, who may then have no children, it should be ascertained, what, in this event, is to become of the intermediate profits. In the absence of any provision of this nature, they will go to the residuary devisee or heir-at-law.

Mortgaged lands.

"3. Where the subject of devise is a mortgaged estate, inquiry should be made, whether the devisee is to take it [freed from] the mortgage; and, if so, words should be used [distinctly conferring on him the] right to have it exonerated out of the [testator's other property] (*b*).

Payment of debts, legacies, etc.

"4. Another question which may be proper, under some circumstances, is, whether any specific fund, constituted of real or personal estate, is to be appropriated for payment of debts, funeral and testamentary expenses, and legacies; and it should always be stated, whether a fund so appropriated, is to exempt the general personal estate from being first applied, as is generally intended, though the intention frequently fails for want of an explicit expression of it.

Provision for wife and children.

"II. In relation to the *objects* of gift.—When a testator proposes to make a disposition of his property in favour of his wife and children, (naturally the first objects of his regard), several modes of disposition present themselves. One is, to give the income to the wife for life, clothed or not with a trust for the maintenance of the children, and to give the inheritance or capital to the children equally, subject or not to a power in the wife of fixing their shares, or limiting the property to some in exclusion of others, as she may think proper. Another mode is, to give the wife and children immediate absolute interest in the property in certain proportions, according to the nature of the distribution of personal property under the statute in case of intestacy; but this mode of disposition is less frequently adopted than the former. To empower the widow to regulate the shares, is often found convenient, not only as it preserves her influence over her children, but because it enables her to adapt the disposition of the property to their various exigencies at the period of her death, and it has, moreover, a salutary effect in restraining the children from disposing of their reversionary interests. Where

(*b*) The alterations indicated by the brackets in this paragraph were made in the 3rd edition of this work, by Messrs. Wolstenholme and Vincent, to meet the alteration in the law made by Locke King's Act, *ante*, p. 1987, which is now extended to personalty.

the children do not take absolutely vested interests until their majority or marriage, it is useful to confer a power on the trustees, with the consent of the widow, or other person taking the prior life interest, to advance some proportion (the maximum of which is usually fixed at half or one-third) of their presumptive shares, in order to place out the sons as apprentices, etc., or for other such purposes. Even where the children take vested (*i.e.*, absolutely vested) interests at their birth, a power of advancement may be requisite where the prior legatee for life is a married woman restrained from alienation, and, therefore, incompetent to accelerate the payment of the shares by relinquishing her life interest. In no other case can the power be wanted under such circumstances.

In regard to children, etc.

"1. The obvious inquiries (in addition to those immediately suggested by the preceding remarks) to be made of a testator, of whose bounty children are to be objects, are—at what ages their shares are to vest;—whether the income or any portion of it is to be applied for maintenance until the period of vesting, and if not *all* applied, what is to become of the excess? (*c*) whether, if any child die in the testator's lifetime, or, subsequently, before the vesting age, leaving children, such children are to be substituted for the deceased parents. If the vesting of the shares be postponed to the death of a prior tenant for life, or other possibly remote period, the necessity for providing for such events is of course more urgent; and in that case it should also be ascertained, whether, if the objects die leaving grandchildren, or more remote issue, but no children, such issue are to stand in the place of their parent.

Daughters' or other females' shares.

"2. If any of the objects of the gift (whether of real or personal property) be females, or the gift be made capable of comprehending them, as in the case of a general devise or bequest to children, it should be suggested, whether their shares are not to be placed out of the power of husbands; *i.e.*, limited to trustees for their separate use for life (*d*), subject or not to a restriction on alienation, (which, however, is a necessary concomitant to give full effect to the intention of excluding marital influence,) with a power of disposition over the inheritance, or capital, as the case may be; and if it be intended to prevent that power of disposition from being exercised, under marital influence, without the possibility of retractation, it should be confined to dispositions *by will*, which, being ambulatory during her life, can never be exercised so as to fetter her power of alienation over the property.

Uses to prevent dower.

"3. If the devise be of the legal estate of lands of inheritance to a man, it should be inquired (though the affirmative may be presumed in the absence of instructions) whether they are to be

(*c*) See now the Trustee Act, 1925, s. 31.
(*d*) See now the Married Women's Property Acts.

limited to uses to bar the dower of any wife to whom he was married on or before the 1st of January, 1834.

Survivorship.

"4. If a gift be made to a plurality of persons, it should be inquired whether they are to take as joint-tenants, or tenants in common; or, in other words, whether with or without survivorship; though it is better in general, where survivorship is intended, to make the devisees tenants in common, with an *express* limitation to the survivors, than to create a joint-tenancy, which may be severed.

To what period referable.

Suggestion as to clauses of survivorship.

"5. In all cases of limitations to survivors, it should be most clearly and explicitly stated *to what period survivorship is to be referred*; that is, whether the property is to go to the persons who are survivors at the death of the testator, or at the period of distribution. It should always be anxiously ascertained, that the testator, in disposing of the shares of dying devisees or legatees among surviving or other objects, does not overlook the possible event of their leaving children or other issue. There can be little doubt that in many cases of absolute gifts to survivors, this contingency is lost sight of. This observation, in regard to the unintentional exclusion of issue, applies to all gifts in which it is made a necessary qualification of the objects, that they should be living at a prescribed period posterior to the testator's decease, and in respect of whom, therefore, the same caution may be suggested.

As to vesting.

"6. It may be observed, that where interests not in possession are created, which are intended to be contingent until a given event or period, this should be explicitly stated; as a contrary construction is generally the result of an absence of expression. Explicitness, generally, on the subject of vesting, cannot be too strongly urged on the attention of the framers of wills.

Words of recommendation, etc.

"7. Where a testator proposes to recommend any person to the favourable regard of another whom he has made the object of his bounty, it should be ascertained whether he intends to impose a legal obligation on the devisee or legatee in favour of such person, or to express a wish without conferring a right. In the former case, a clear and definite trust should be created; and in the latter, words negativing such a construction of the testator's expressions should be used. Equivocal language in these cases has given rise to much litigation.

Making will conditional on testator's leaving no issue.

"*Lastly*. It may be suggested, that where a testator is married, and has no children, unless provision be made in his will for children coming *in esse*, or it be unreasonable to contemplate his having issue, the dispositions of his will should be made expressly contingent on his *leaving* no issue surviving him; for, as the birth of children alone is not a revocation, they may be excluded under a will made when their existence was not contemplated; and cases of great hardship of this kind have sometimes arisen from the neglect of testators to make a new

disposition of their property at the birth of children; indeed, it has sometimes happened, that a testator has left a child *en ventre*, without being conscious of the fact; for the same reason provisions for the children of a married testator, who has children, should never be confined to children *in esse* at the making of the will. A gift to the testator's children generally will include all possible objects. Where, however, the gift is to the children of *another* person, and it is intended (as it generally is,) to include all the children *thereafter to be born*, terms to this effect should be used, unless a prior life interest is given to the parent of such children; in which case, as none can be born after the gift to them vests in possession, which is the period according to the established rule of ascertaining the objects, none can be excluded.

As to the persons through whom instructions are received.

"To the preceding suggestions, it may not be useless to add, that it is in general desirable, that professional gentlemen taking instructions for wills should receive their instructions immediately from the testator himself, rather than from third persons, particularly where such persons are interested. In a case in the Prerogative Court (*e*), Sir J. Nicholl 'admonished professional gentlemen generally, that where instructions for a will are given by a party not being the proposed testator, *a fortiori*, where by an interested party, it is their bounden duty to satisfy themselves thoroughly, either in person, or by the instrumentality of some confidential agent, as to the proposed testator's volition and capacity, or in other words, that the instrument expresses the real testamentary intentions of a capable testator, prior to its being executed *de facto* as a will at all.'"

(*e*) *Rogers* v. *Pittis*, 1 Add. 46.

APPENDIX B.

THE WILLS ACT, 1837.

1 Vict. c. 26.

An Act for the Amendment of the Laws with respect to Wills.
[3rd July, 1837.]

EXPLANATION OF TERMS.

Meaning of certain words in this Act;

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present parliament assembled, and by the authority of the same, That (*a*) the words and expressions hereinafter mentioned, which in their ordinary signification have a more confined or a different meaning, shall in this Act, except where the nature of the provision or the context of the Act shall exclude such construction, be interpreted as follows: (that is to say,) the word "will" shall extend to a testament, and to a codicil, and to an appointment by will or by writing in the nature of a will in exercise of a power, and also to a disposition by will and testament or devise of the custody and tuition of any child, by virtue of an Act passed in the twelfth year of the reign of King Charles the Second, intituled "An Act for taking away the Court of Wards and Liveries, and Tenures in Capite and by Knights Service, and Purveyance, and for settling a Revenue upon his Majesty in lieu thereof," or by virtue of an Act passed in the parliament of Ireland in the fourteenth and fifteenth years of the reign of King Charles the Second, intituled "An Act for taking away the Court of Wards and Liveries, and Tenures in Capite and by Knights Service," and to any other testamentary disposition; and the words "real estate" shall extend to manors, advowsons, messuages, lands, tithes, rents, and hereditaments, whether freehold, customary freehold, tenant-right, customary or copyhold, or of any other tenure, and whether corporeal, incorporeal, or personal, and to any undivided share thereof, and to any estate, right, or interest (other than a chattel interest) therein; and the words "personal estate" shall extend to leasehold estates and other chattels real, and also to moneys, shares of government and other funds, securities for money (not being real estates), debts, choses in action, rights, credits, goods, and all other property whatsoever which by law devolves upon the

"Will."

12 Car. 2, c. 24.

14 & 15 Car. 2, (I.).

"Real estate."

"Personal estate."

(*a*) The initial words down to "That" were repealed by the Statute Law Revision Act, 1893.

executor or administrator, and to any share or interest therein; and every word importing the singular number only shall extend and be applied to several persons or things as well as one person or thing; and every word importing the masculine gender only shall extend and be applied to a female as well as a male.

Number.

Gender.

REPEAL CLAUSE (*b*).

II. And be it further enacted, That an Act passed in the thirty-second year of the reign of King Henry the Eighth intituled "The Act of Wills, Wards and Primer Seisins, whereby a man may devise two parts of his lands;" and also an Act passed in the thirty-fourth and thirty-fifth years of the reign of the said King Henry the Eighth, intituled "The Bill concerning the Explanation of Wills;" and also an Act passed in the parliament of Ireland, in the tenth year of the reign of King Charles the First, intituled "An Act how Lands, Tenements, etc. may be disposed by Will or otherwise, and concerning Wards and Primer Seisins;" and also so much of an Act passed in the twenty-ninth year of the reign of King Charles the Second, intituled "An Act for Prevention of Frauds and Perjuries," and of an Act passed in the parliament of Ireland in the seventh year of the reign of King William the Third, intituled "An Act for Prevention of Frauds and Perjuries," as relates to devises or bequests of lands or tenements, or to the revocation or alteration of any devise in writing of any lands, tenements, or hereditaments, or any clause thereof, or to the devise of any estate pur autre vie, or to any such estate being assets, or to nuncupative wills, or to the repeal, altering, or changing of any will in writing concerning any goods or chattels or personal estate, or any clause, devise, or bequest therein; and also so much of an Act passed in the fourth and fifth years of the reign of Queen Anne, intituled "An Act for the Amendment of the Law and the better Advancement of Justice," and of an Act passed in the parliament of Ireland in the sixth year of the reign of Queen Anne, intituled "An Act for the Amendment of the Law, and the better Advancement of Justice," as relates to witnesses to nuncupative wills; and also so much of an Act passed in the fourteenth year of the reign of King George the Second, intituled "An Act to amend the Law concerning Common Recoveries, and to explain and amend an Act made in the twenty-ninth year of the reign of King Charles the Second, intituled 'An Act for Prevention of Frauds and Perjuries,'" as relates to estates pur autre vie; and also an Act passed in the twenty-fifth year of the reign of King George the Second, intituled "An Act for avoiding and putting an end to certain Doubts and Questions relating to the attestation of Wills and Codicils concerning Real Estates in that part of Great Britain called England, and in his Majesty's Colonies and Plantations in America, except so far as relates to his Majesty's colonies and

Repeal of the statutes of wills, 32 H. 8, c. 1, and 34 & 35 H. 8, c. 5.

10 Car. 1, sess. 2, c. 2, (I.).

Sects. 5, 6, 12, 19, 20, 21 and 22 of the Statute of Frauds, 29 Car. 2, c. 3; 7 W. 3, c. 12, (I.).

Sect. 14 of 4 & 5 Anne, c. 16.

6 Anne, c. 10, (I.).

Sect. 9 of 14 Geo. 2, c. 20.

25 Geo. 2, c. 6, (except as to Colonies).

(*b*) Repealed by 37 & 38 Vict. c. 35.

25 Geo. 2, c. 11, (I.).

plantations in America;" and also an Act passed in the parliament of Ireland in the same twenty-fifth year of the reign of King George the Second, intituled "An Act for the avoiding and putting an end to certain doubts and questions relating to the Attestations of Wills and Codicils concerning Real Estates;" and also an Act passed in the fifty-fifth year of the reign of King George the Third, intituled "An Act to remove certain Difficulties in the Disposition of Copyhold Estates by Will," shall be and the same are hereby repealed, except so far as the same Acts or any of them respectively relate, to any wills or estates pur autre vie to which this Act does not extend.

55 Geo. 3, c. 192.

GENERAL ENABLING CLAUSE.

All property may be disposed of by will;

III. And be it further enacted, That it shall be lawful for every person to devise, bequeath, or dispose of, by his will executed in manner hereinafter required, all real estate (*c*) and all personal estate (*d*) which he shall be entitled to, either at law or in equity, at the time of his death, and which if not so devised, bequeathed, or disposed of would devolve upon the heir-at-law, or customary heir of him, or, if he became entitled by descent, of his ancestor, or upon his executor or administrator; and that the power hereby given shall extend to all real estate of the nature of customary freehold or tenant right, or customary or copyhold, notwithstanding that the testator may not have surrendered the same to the use of his will, or notwithstanding that, being entitled as heir, devisee, or otherwise to be admitted thereto, he shall not have been admitted thereto, or notwithstanding that the same, in consequence of the want of a custom to devise or surrender to the use of a will or otherwise, could not at law have been disposed of by will if this Act had not been made, or notwithstanding that the same, in consequence of there being a custom that a will or a surrender to the use of a will should continue in force for a limited time only, or any other special custom, could not have been disposed of by will according to the power contained in this Act, if this Act had not been made; and also to estates pur autre vie, whether there shall or shall not be any special occupant thereof, and whether the same shall be freehold, customary freehold, tenant right, customary or copyhold, or of any other tenure, and whether the same shall be a corporeal or an incorporeal hereditament (*e*); and also to all contingent, executory, or other future interests in any real or personal estate, whether the testator may or may not be ascertained as the person or one of the persons in whom the same respectively may become vested, and whether he may be entitled thereto under the instrument by which the same respectively were created, or under any disposition thereof by deed or

comprising customary freeholds and copyholds without surrender and before admittance, and also such of them as cannot now be devised;

estates pur autre vie;

contingent interests;

(*c*) P. 65.
(*d*) P. 65.
(*e*) P. 67.

will (*f*); and also to all rights of entry for conditions broken, and other rights of entry (*g*); and also to such of the same estates, interests, and rights respectively, and other real and personal estate, as the testator may be entitled to at the time of his death, notwithstanding that he may become entitled to the same subsequently to the execution of his will.

rights of entry; and property acquired after execution of the will.

FEES ON COPYHOLDS.

IV. (*h*) Provided always, and be it further enacted, That where any real estate of the nature of customary freehold or tenant right, or customary or copyhold, might, by the custom of the manor of which the same is holden, have been surrendered to the use of a will, and the testator shall not have surrendered the same to the use of his will, no person entitled or claiming to be entitled thereto by virtue of such will shall be entitled to be admitted, except upon payment of all such stamp duties, fees, and sums of money as would have been lawfully due and payable in respect of the surrendering of such real estate to the use of the will, or in respect of presenting, registering, or enrolling such surrender, if the same real estate had been surrendered to the use of the will of such testator: provided also, that where the testator was entitled to have been admitted to such real estate, and might, if he had been admitted thereto, have surrendered the same to the use of his will, and shall not have been admitted thereto, no person entitled or claiming to be entitled to such real estate in consequence of such will shall be entitled to be admitted to the same real estate by virtue thereof, except on payment of all such stamp duties, fees, fine, and sums of money as would have been lawfully due and payable in respect of the admittance of such testator to such real estate, and also of all such stamp duties, fees, and sums of money as would have been lawfully due and payable in respect of surrendering such real estate to the use of the will, or of presenting, registering, or enrolling such surrender, had the testator been duly admitted to such real estate, and afterwards surrendered the same to the use of his will; all which stamp duties, fees, fine, or sums of money due as aforesaid shall be paid in addition to the stamp duties, fees, fine, or sums of money due or payable on the admittance of such person so entitled or claiming to be entitled to the same real estate as aforesaid.

As to the fees and fines payable by devisees of customary and copyhold estates.

COPYHOLD.

V. And be it further enacted, That when any real estate of the nature of customary freehold or tenant right, or customary or copyhold, shall be disposed of by will, the lord of the manor or reputed manor of which such real estate is holden, or his

Wills, or extracts of wills of customary freeholds and copyholds to be entered on the court rolls;

(*f*) P. 74.
(*g*) P. 75.
(*h*) See 4 & 5 Vict. c. 35, ss. 88, 89, 90. Copyholds are now abolished.

steward, or the deputy of such steward, shall cause the will by which such disposition shall be made, or so much thereof as shall contain the disposition of such real estate, to be entered on the court rolls of such manor or reputed manor; and when any trusts are declared by the will of such real estate, it shall not be necessary to enter the declaration of such trusts, but it shall be sufficient to state in the entry on the court rolls that such real estate is subject to the trusts declared by such will; and when any such real estate could not have been disposed of by will if this Act had not been made, the same fine, heriot, dues, duties, and services shall be paid and rendered by the devisee as would have been due from the customary heir in case of the descent of the same real estate, and the lord shall as against the devisee of such estate have the same remedy for recovering and enforcing such fine, heriot, dues, duties, and services as he is now entitled to for recovering and enforcing the same from or against the customary heir in case of a descent.

and the lord to be entitled to the same fine, etc., when such estates were not previously devisable as he would have been from the heir in case of descent.

ESTATES PUR AUTRE VIE.

Estates pur autre vie.

VI. (*i*) And be it further enacted, That if no disposition by will shall be made of any estate pur autre vie of a freehold nature, the same shall be chargeable in the hands of the heir, if it shall come to him by reason of special occupancy, as assets by descent, as in the case of freehold land in fee simple; and in case there shall be no special occupant of any estate pur autre vie, whether freehold or customary freehold, tenant right, customary or copyhold, or of any other tenure, and whether a corporeal or incorporeal hereditament, it shall go to the executor or administrator of the party that had the estate thereof by virtue of the grant; and if the same shall come to the executor or administrator either by reason of a special occupancy or by virtue of this Act, it shall be assets in his hands, and shall go and be applied and distributed in the same manner as the personal estate of the testator or intestate.

AGE OF TESTATOR.

No will of a person under age valid;

VII. (*k*) And be it further enacted, That no will made by any person under the age of twenty-one years shall be valid.

MARRIED WOMEN.

nor of a feme covert, except such as might have been previously made.

VIII. Provided also, and be it further enacted, That no will made by any married woman shall be valid, except such a will as might have been made (*l*) by a married woman before the passing of this Act (*m*).

(*i*) P. 67.
(*k*) P. 52.
(*l*) P. 58.
(*m*) P. 396.

EXECUTION OF WILLS.

IX. (*n*) And be it further enacted, that no will shall be valid unless it shall be in writing and executed in manner hereinafter mentioned; (that is to say,) it shall be signed (*o*) at the foot or end (*p*) thereof by the testator, or by some other person in his presence and by his direction (*q*); and such signature shall be made or acknowledged (*r*) by the testator in the presence of two or more witnesses present at the same time (*s*), and such witnesses shall attest and shall subscribe (*t*) the will in the presence (*u*) of the testator, but no form of attestation (*x*) shall be necessary.

Will to be in writing, and signed or acknowledged in the presence of two witnesses at one time, who attest.

EXECUTION OF TESTAMENTARY APPOINTMENTS.

X. (*y*) And be it further enacted, That no appointment made by will, in exercise of any power, shall be valid, unless the same be executed in manner hereinbefore required; and every will executed in manner hereinbefore required shall, so far as respects the execution and attestation thereof, be a valid execution of a power of appointment by will, notwithstanding it shall have been expressly required that a will made in exercise of such power should be executed with some additional or other form of execution or solemnity.

Appointments by will to be executed like other wills, and to be valid, although other required solemnities are not observed.

WILLS OF SOLDIERS AND SEAMEN.

XI. (*z*) Provided always, and be it further enacted, That any soldier being in actual military service, or any mariner or seaman being at sea, may dispose of his personal estate as he might have done before the making of this Act.

Soldiers' and mariners' wills excepted.

PETTY OFFICERS, SEAMEN AND MARINES.

XII. (*a*) And be it further enacted, That this Act shall not prejudice or affect any of the provisions contained in an Act passed in the eleventh year of the reign of his Majesty King George the Fourth and the first year of the reign of his late Majesty King William the Fourth, intituled "An Act to amend and consolidate the Laws relating to the Pay of the Royal Navy, respecting the wills of Petty Officers and Seamen in the Royal Navy, and Non-commissioned Officers of Marines, and Marines,

Act not to affect certain provisions of 11 G. 4 & 1 W. 4, c. 20, with respect to wills of petty officers, and seamen and marines.

(*n*) P. 93.
(*o*) P. 95.
(*p*) P. 110.
(*q*) Pp. 96, 112.
(*r*) Pp. 101 *seq.*
(*s*) P. 103.
(*t*) P. 103.
(*u*) Pp. 107 *seq.*
(*x*) P. 109.
(*y*) Pp. 774, 775.
(*z*) P. 81.
(*a*) Repealed by 28 & 29 Vict. c. 112.

so far as relates to their Wages, Pay, Prize Money, Bounty Money, and Allowances, or other Moneys payable in respect of Services in Her Majesty's Navy."

PUBLICATION.

Publication not to be requisite.

XIII. And be it further enacted, That every will executed in manner hereinbefore required shall be valid without any other publication thereof.

ATTESTING WITNESSES' COMPETENCY.

Will not to be void on account of incompetency of attesting witness.

XIV. (*b*) And be it further enacted, That if any person who shall attest the execution of a will shall at the time of the execution thereof or at any time afterwards be incompetent to be admitted a witness to prove the execution thereof, such will shall not on that account be invalid.

GIFTS TO ATTESTING WITNESSES.

Gifts to an attesting witness to be void.

XV. (*c*) And be it further enacted, That if any person shall attest the execution of any will to whom or to whose wife or husband any beneficial devise, legacy, estate, interest, gift, or appointment, of or affecting any real or personal estate (other than and except charges and directions for the payment of any debt or debts), shall be thereby given or made, such devise, legacy, estate, interest, gift, or appointment shall, so far only as concerns such person attesting the execution of such will, or the wife or husband of such person, or any person claiming under such person or wife or husband, be utterly null and void, and such person so attesting shall be admitted as a witness to prove the execution of such will, or to prove the validity or invalidity thereof, notwithstanding such devise, legacy, estate, interest, gift, or appointment mentioned in such will.

CREDITOR ATTESTING WITNESS.

Creditor attesting to be admitted a witness.

XVI. (*d*) And be it further enacted, That in case by any will any real or personal estate shall be charged with any debt or debts, and any creditor, or the wife or husband of any creditor, whose debt is so charged, shall attest the execution of such will, such creditor notwithstanding such charge shall be admitted a witness to prove the execution of such will, or to prove the validity or invalidity thereof.

EXECUTOR ATTESTING WITNESS.

Executor to be admitted a witness.

XVII. (*e*) And be it further enacted, That no person shall, on account of his being an executor of a will, be incompetent to

(*b*) P. 81.
(*c*) Pp. 80 *seq.*
(*d*) P. 81.
(*e*) P. 81.

be admitted a witness to prove the execution of such will, or a witness to prove the validity or invalidity thereof.

REVOCATION BY MARRIAGE.

XVIII. (*f*) And be it further enacted, That every will made by a man or woman shall be revoked by his or her marriage (except a will made in exercise of a power of appointment, when the real or personal estate thereby appointed would not in default of such appointment pass to his or her heir, customary heir, executor, or administrator, or the person entitled as his or her next-of-kin, under the Statute of Distributions).

Will to be revoked by marriage.

REVOCATION BY PRESUMPTION.

XIX. (*g*) And be it further enacted, That no will shall be revoked by any presumption of an intention on the ground of an alteration in circumstances.

No will to be revoked by presumption.

REVOCATION BY SUBSEQUENT WILL OR CODICIL, OR DESTRUCTION OF INSTRUMENT.

XX. And be it further enacted, That no will or codicil, or any part thereof, shall be revoked otherwise than as aforesaid, or by another will or codicil executed in manner hereinbefore required (*h*), or by some writing declaring an intention to revoke the same, and executed in the manner in which a will is hereinbefore required to be executed (*i*), or by the burning, tearing, or otherwise destroying the same (*l*) by the testator, or by some person in his presence and by his direction, with the intention (*m*) of revoking the same.

No will to be revoked but by another will or codicil, or writing, or by destruction.

OBLITERATIONS AND INTERLINEATIONS.

XXI. (*n*) And be it further enacted, That no obliteration, interlineation, or other alteration made in any will after the execution thereof shall be valid or have any effect, except so far as the words or effect of the will before such alteration shall not be apparent, unless such alteration shall be executed in like manner as hereinbefore is required for the execution of the will; but the will, with such alteration as part thereof, shall be deemed to be duly executed if the signature of the testator and the subscription of the witnesses be made in the margin or on some other part of the will opposite or near to such alteration, or at the foot or end of or opposite to a memorandum referring to

No alteration except in certain cases, in a will, shall have any effect, unless executed as a will.

(*f*) P. 129.
(*g*) Pp. 129, 177.
(*h*) P. 152.
(*i*) P. 152.
(*l*) P. 130.
(*m*) P. 132.
(*n*) Pp. 143 *seq.*

such alteration, and written at the end or some other part of the will.

REVIVAL OF REVOKED WILL.

No will revoked to be revived otherwise than by re-execution, or a codicil.

XXII. (*o*) And be it further enacted, That no will or codicil, or any part thereof, which shall be in any manner revoked, shall be revived otherwise than by the re-execution thereof, or by a codicil executed in manner hereinbefore required, and showing an intention to revive the same; and when any will or codicil which shall be partly revoked, and afterwards wholly revoked, shall be revived, such revival shall not extend to so much thereof as shall have been revoked before the revocation of the whole thereof, unless an intention to the contrary shall be shown.

REVOCATION—SUBSEQUENT CONVEYANCE.

A devise not to be rendered inoperative by any subsequent conveyance or act.

XXIII. And be it further enacted, That no conveyance or other act made or done subsequently to the execution of a will of or relating to any real or personal estate therein comprised, except an act by which such will shall be revoked as aforesaid, shall prevent the operation of the will with respect to such estate or interest in such real or personal estate as the testator shall have power to dispose of by will at the time of his death.

WILL SPEAKS, FROM WHAT PERIOD.

A will shall be construed to speak from the death of the testator.

XXIV. (*p*) And be it further enacted, That every will shall be construed, with reference to the real estate and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will.

LAPSED AND VOID DEVISES.

A residuary devise shall include estates comprised in lapsed and void devises.

XXV. (*q*) And be it further enacted, That, unless a contrary intention shall appear by the will, such real estate or interest therein as shall be comprised or intended to be comprised in any devise in such will contained, which shall fail or be void by reason of the death of the devisee in the lifetime of the testator, or by reason of such devise being contrary to law, or otherwise incapable of taking effect, shall be included in the residuary devise (if any) contained in such will.

GENERAL DEVISE—COPYHOLDS AND LEASEHOLDS.

A general devise of lands shall include copyhold and leasehold as well as freehold lands.

XXVI. (*r*) And be it further enacted, That a devise of the land of the testator, or of the land of the testator in any place or in the occupation of any person mentioned in his will, or

(*o*) Pp. 178 *seq.*
(*p*) Pp. 372 *seq.*, 924; *O'Toole* v. *Browne*, 3 Ell. & Bl. 572.
(*q*) Pp. 420 *seq.*, 924 *seq.*
(*r*) Pp. 936 *seq.*

otherwise described in a general manner, and any other general devise which would describe a customary, copyhold, or leasehold estate if the testator had no freehold estate which could be described by it, shall be construed to include the customary, copyhold, and leasehold estates of the testator, or his customary, copyhold, and leasehold estates, or any of them, to which such description shall extend, as the case may be, as well as freehold estates, unless a contrary intention shall appear by the will.

GENERAL DEVISE—APPOINTMENT.

A general gift shall include estates over which the testator has a general power of appointment.

XXVII. (*s*) And be it further enacted, That a general devise of the real estate of the testator, or of the real estate of the testator in any place or in the occupation of any person mentioned in his will, or otherwise described in a general manner, shall be construed to include any real estate, or any real estate to which such description shall extend (as the case may be), which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power, unless a contrary intention shall appear by the will; and in like manner a bequest of the personal estate of the testator, or any bequest of personal property described in a general manner, shall be construed to include any personal estate, or any personal estate to which such description shall extend (as the case may be), which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power, unless a contrary intention shall appear by the will.

FEE SIMPLE WITHOUT WORDS OF LIMITATION.

A devise without any words of limitation to pass the fee.

XXVIII. (*t*) And be it further enacted, That where any real estate shall be devised to any person without any words of limitation, such devise shall be construed to pass the fee simple, or other the whole estate or interest which the testator had power to dispose of by will in such real estate, unless a contrary intention shall appear by the will.

WORDS IMPORTING FAILURE OF ISSUE.

Words importing failure of issue to mean issue living at the death.

XXIX. (*u*) And be it further enacted, That in any devise or bequest of real or personal estate the words "die without issue," or "die without leaving issue," or "have no issue," or any other words which may import either a want or failure of issue of any person in his lifetime or at the time of his death, or an indefinite failure of his issue, shall be construed to mean a want or failure of issue in the lifetime or at the time of the death of such person, and not an indefinite failure of his issue, unless a contrary intention shall appear by the will, by reason of such person having a prior estate tail, or of a preceding gift, being,

(*s*) Pp. 780 *seq.*
(*t*) Pp. 1781 *seq.*
(*u*) Pp. 1914 *seq.*

Proviso.

without any implication arising from such words, a limitation of an estate tail to such person or issue or otherwise : Provided, that this Act shall not extend to cases where such words as aforesaid import if no issue described in a preceding gift shall be born, or if there shall be no issue who shall live to attain the age or otherwise answer the description required for obtaining a vested estate by a preceding gift to such issue.

ESTATE OF TRUSTEES.

No devise to trustees or executors, except for a term or a presentation to a church, shall pass a chattel interest.

XXX. (*x*) And be it further enacted, That where any real estate (other than or not being a presentation to a church) shall be devised to any trustee or executor, such devise shall be construed to pass the fee simple or other the whole estate or interest which the testator had power to dispose of by will in such real estate, unless a definite term of years, absolute or determinable, or an estate of freehold, shall thereby be given to him expressly or by implication.

ESTATE OF TRUSTEES.

Trustees under an unlimited devise, where the trust may endure beyond the life of a person beneficially entitled for life, to take the fee.

XXXI. (*y*) And be it further enacted, That where any real estate shall be devised to a trustee, without any express limitation of the estate to be taken by such trustee, and the beneficial interest in such real estate, or in the surplus rents and profits thereof, shall not be given to any person for life, or such beneficial interest shall be given to any person for life, but the purposes of the trust may continue beyond the life of such person, such devise shall be construed to vest in such trustee the fee simple, or other the whole legal estate which the testator had power to dispose of by will in such real estate, and not an estate determinable when the purposes of the trust shall be satisfied.

LAPSE OF ESTATE TAIL.

Devises of estates tail shall not lapse, when.

XXXII. (*z*) And be it further enacted, That where any person to whom any real estate shall be devised for an estate tail or an estate in quasi entail shall die in the lifetime of the testator leaving issue who would be inheritable under such entail, and any such issue shall be living at the time of the death of the testator, such devise shall not lapse, but shall take effect as if the death of such person had happened immediately after the death of the testator, unless a contrary intention shall appear by the will.

LAPSE—CHILDREN OR ISSUE DYING IN TESTATOR'S LIFETIME.

Gifts to children or other issue who leave issue living at the testator's death shall not lapse.

XXXIII. (*a*) And be it further enacted, That where any person being a child or other issue of the testator to whom any real or personal estate shall be devised or bequeathed for any estate or interest not determinable at or before the death of such

(*x*) P. 1785.
(*y*) *Ibid.*
(*z*) P. 421.
(*a*) P. 421.

person shall die in the lifetime of the testator leaving issue, and any such issue of such person shall be living at the time of the death of the testator, such devise or bequest shall not lapse, but shall take effect as if the death of such person had happened immediately after the death of the testator, unless a contrary intention shall appear by the will.

WHEN ACT OPERATES.

XXXIV. And be it further enacted, That this Act shall not extend to any will made before the first day of January one thousand eight hundred and thirty-eight, and that every will re-executed or republished, or revived by any codicil, shall for the purposes of this Act be deemed to have been made at the time at which the same shall be so re-executed, republished, or revived; and that this Act shall not extend to any estate pur autre vie of any person who shall die before the first day of January, one thousand eight hundred and thirty-eight.

Act not to extend to wills made before 1838, nor to estates pur autre vie of persons who die before 1838.

SCOTLAND.

XXXV. And be it further enacted, That this Act shall not extend to Scotland.

Act not to extend to Scotland.

APPENDIX C.

SECTIONS 130—132 AND 175—179 OF THE LAW OF PROPERTY ACT, 1925.

Creation of entailed interests in real and personal property.

130.—(1) An interest in tail or in tail male or in tail female or in tail special (in this Act referred to as "an entailed interest") may be created by way of trust in any property, real or personal, but only by the like expressions as those by which before the commencement of this Act a similar estate tail could have been created by deed (not being an executory instrument) in freehold land, and with the like results, including the right to bar the entail either absolutely or so as to create an interest equivalent to a base fee, and accordingly all statutory provisions relating to estates tail in real property shall apply to entailed interests in personal property.

Personal estate so entailed (not being chattels settled as heirlooms) may be invested, applied, and otherwise dealt with as if the same were capital money or securities representing capital money arising under the Settled Land Act, 1925, from land settled on the like trusts.

(2) Expressions contained in an instrument coming into operation after the commencement of this Act, which, in a will, or executory instrument coming into operation before such commencement, would have created an entailed interest in freehold land, but would not have been effectual for that purpose in a deed not being an executory instrument, shall (save as provided by the next succeeding section) operate in equity, in regard to property real or personal, to create absolute, fee simple or other interests corresponding to those which, if the property affected had been personal estate, would have been created therein by similar expressions before the commencement of this Act.

(3) Where personal estate (including the proceeds of sale of land directed to be sold and chattels directed to be held as heirlooms) is, after the commencement of this Act, directed to be enjoyed or held with, or upon trusts corresponding to trusts affecting, land in which, either before or after the commencement of this Act an entailed interest has been created, and is subsisting, such direction shall be deemed sufficient to create a corresponding entailed interest in such personal estate.

(4) In default of and subject to the execution of a disentailing assurance or the exercise of the testamentary power conferred by this Act, an entailed interest (to the extent of the property affected) shall devolve as an equitable interest, from time to time, upon the persons who would have been successively entitled thereto as the heirs of the body (either generally or of

a particular class) of the tenant in tail or other person, or as tenant by the curtesy, if the entailed interest had, before the commencement of this Act, been limited in respect of freehold land governed by the general law in force immediately before such commencement, and such law had remained unaffected.

(5) Where personal chattels are settled without reference to settled land on trusts creating entailed interests therein, the trustees, with the consent of the usufructuary for the time being if of full age, may sell the chattels or any of them, and the net proceeds of any such sale shall be held in trust for and shall go to the same persons successively, in the same manner and for the same interests, as the chattels sold would have been held and gone if they had not been sold, and the income of investments representing such proceeds of sale shall be applied accordingly.

(6) An entailed interest shall only be capable of being created by a settlement of real or personal property or the proceeds of sale thereof (including the will of a person dying after the commencement of this Act), or by an agreement for a settlement in which the trusts to affect the property are sufficiently declared.

(7) In this Act where the context so admits "entailed interest" includes an estate tail (now made to take effect as an equitable interest) created before the commencement of this Act.

Abolition of the rule in *Shelley's Case.*

131. Where by any instrument coming into operation after the commencement of this Act an interest in any property is expressed to be given to the heir or heirs or issue or any particular heir or any class of the heirs or issue of any person in words which, but for this section would, under the rule of law known as the Rule in Shelley's case, have operated to give to that person an interest in fee simple or an entailed interest, such words shall operate in equity as words of purchase and not of limitation, and shall be construed and have effect accordingly, and in the case of an interest in any property expressed to be given to an heir or heirs or any particular heir or class of heirs, the same person or persons shall take as would in the case of freehold land have answered that description under the general law in force before the commencement of this Act.

As to heirs taking by purchase.

132.—(1) A limitation of real or personal property in favour of the heir, either general or special, of a deceased person which, if limited in respect of freehold land before the commencement of this Act, would have conferred on the heir an estate in the land by purchase, shall operate to confer a corresponding equitable interest in the property on the person who would, if the general law in force immediately before such commencement had remained unaffected, have answered the description of the heir, either general or special, of the deceased in respect of his freehold land, either at the death of the deceased or at the time named in the limitation, as the case may require.

(2) This section applies whether the deceased person dies

before or after the commencement of this Act, but only applies to limitations or trusts created by an instrument coming into operation after such commencement.

Contingent and future testamentary gifts to carry the intermediate income.

175.—(1) A contingent or future specific devise or bequest of property, whether real or personal, and a contingent residuary devise of freehold land, and a specific or residuary devise of freehold land to trustees upon trust for persons whose interests are contingent or executory shall, subject to the statutory provisions relating to accumulations, carry the intermediate income of that property from the death of the testator, except so far as such income, or any part thereof, may be otherwise expressly disposed of.

(2) This section applies only to wills coming into operation after the commencement of this Act.

Power for tenant in tail in possession to dispose of property by specific devise or bequest.

176.—(1) A tenant in tail of full age shall have power to dispose by will, by means of a devise or bequest referring specifically either to the property or to the instrument under which it was acquired or to entailed property generally—

(a) of all property of which he is tenant in tail in possession at his death; and

(b) of money (including the proceeds of property directed to be sold) subject to be invested in the purchase of property, of which if it had been so invested he would have been tenant in tail in possession at his death;

in like manner as if, after barring the entail, he had been tenant in fee-simple or absolute owner thereof for an equitable interest at his death, but, subject to and in default of any such disposition by will, such property shall devolve in the same manner as if this section had not been passed.

(2) This section applies to entailed interests authorised to be created by this Act as well as to estates tail created before the commencement of this Act, but does not extend to a tenant in tail who is by statute restrained from barring or defeating his estate tail, whether the land or property in respect whereof he is so restrained was purchased with money provided by Parliament in consideration of public services or not, or to a tenant in tail after possibility of issue extinct, and does not render any interest which is not disposed of by the will of the tenant in tail liable for his debts or other liabilities.

(3) In this section "tenant in tail" includes an owner of a base fee in possession who has power to enlarge the base fee into a fee-simple without the concurrence of any other person.

(4) This section only applies to wills executed after the commencement of this Act, or confirmed or republished by codicil executed after such commencement.

Wills in contemplation of marriage.

177.—(1) A will expressed to be made in contemplation of a marriage shall, notwithstanding anything in section eighteen of

the Wills Act, 1837, or any other statutory provision or rule of law to the contrary, not be revoked by the solemnisation of the marriage contemplated. 7 Will. 4 & 1 Vict. c. 26.

(2) This section only applies to wills made after the commencement of this Act.

178. Section three of the Wills Act, 1837, shall (without prejudice to the rights and interests of a personal representative) authorise and be deemed always to have authorised any person to dispose of real property or chattels real by will notwithstanding that by reason of illegitimacy or otherwise he did not leave an heir or next-of-kin surviving him. Power for persons having no issue to dispose of real estate by will.

179. The Lord Chancellor may from time to time prescribe and publish forms to which a testator may refer in his will, and give directions as to the manner in which they may be referred to, but, unless so referred to, such forms shall not be deemed to be incorporated in a will. Prescribed forms for reference in will.

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